REPORT TO THE
NORTH PACIFIC FISHERY MANAGEMENT COUNCIL

LEGAL ASSESSMENT OF
THE COUNCIL'S ROLE UNDER THE
MAGNUSON-STEVENS ACT, THE ENDANGERED SPECIES ACT, AND THE NATIONAL ENVIRONMENTAL POLICY ACT

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EXECUTIVE SUMMARY

The North Pacific Fishery Management Council requested an independent legal assessment of the council's role in the implementation of its responsibilities in the management of marine fisheries in the U.S. exclusive economic zone under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C. § 1801 et seq. In particular, the council desires legal guidance on the respective roles of the council and the National Marine Fisheries Service (NMFS) in the fishery management process with respect to meeting the mandates of the Endangered Species Act of 1973 (ESA), 16 U.S.C. § 1531 et seq., and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321-4370f.

This report, prepared by James P. Walsh, Alison Rieser, and Henry Wilson, under contract to the North Pacific Council, addresses the questions posed by the Council's staff as to the council's role in satisfying the legal requirements of the ESA and NEPA in carrying out its duties under Magnuson-Stevens Act. This Executive Summary lists those questions and provides a brief answer to each question. The body of the report provides an analysis of each statute, a discussion of relevant authorities, and the reasoning behind the responses provided.

Questions Presented

1. What is the role of the council, and the limits of that role, in the implementation of the ESA, including with respect to: (a) the preparation of fishery management plans that may incidentally take listed species or affect critical habitat of such species in the course of fishing activities under the Magnuson-Stevens Act; (b) the consultation process created pursuant to Section 7 of the ESA and agency regulations governing the process, 50 C.F.R. Part 402; (c) the preparation and review of biological opinions and preparation of reasonable and prudent alternatives to avoid jeopardy, if any; (d) the promulgation of regulations governing the taking of threatened species under Section 4(d) of the ESA; (e) the preparation of recovery plans under Section 4(f) of the ESA; and (f) the application for and approval of a permit for the taking of an endangered species under Section 10 of the ESA?

2. What is the council's role in meeting the requirements of environmental impact review under NEPA, including with respect to initial preparation of an environmental assessment or environmental impact statement, development and selection of alternatives to a proposed action, and otherwise satisfying applicable NEPA regulations issued by NMFS and the Council on Environmental Quality, 40 C.F.R. Part 1500?

3. What role, if any, does the council have in defense of litigation arising under the Magnuson-Stevens Act, ESA, or NEPA and challenging a fishery management plan (or amendment) or regulations recommended by the council and approved by NMFS, including discussions with respect to settlement negotiations that may result in new or changed fishery management measures?

4. Where procedural and/or substantive conflicts in statutory requirements exist in the implementation of the Magnuson-Stevens Act, the ESA, and NEPA, which statute or statutory requirements prevail?

Summary Answers

1. The council has the authority to develop fishery management plans and take other actions under the Magnuson-Stevens Act, subject to the review and approval of the Secretary of Commerce. Given the ESA's broad definition of "federal agency" and of "action," and prior legal precedent concluding that councils are federal agencies for other purposes, the council is part of the "action agency" for purposes of the ESA. The council has the initial responsibility for assessing the impact of fishery management actions on listed species and critical habitat. The council also has the affirmative duty under Section 7(a)(1) of the ESA to use its authority in furtherance of the purpose of the ESA. NMFS has the final authority for determining ESA compliance as part of the process of approving, disapproving or partially approving the council's recommended actions. As the "consulting service," NMFS also has the responsibility of preparing any biological opinion with respect to any approved fishery management action under Section 7 of the ESA. The council has additional opportunities to participate in implementation of the ESA in light of NMFS' policy with respect to the development of recovery plans and conservation regulations under Section 4 of the ESA.

2. The council has the primary responsibility for initiating the NEPA scoping process, deciding whether an environmental assessment or environmental impact statement should be prepared, developing and selecting the alternatives to a proposed action, preparing draft environmental documents, and soliciting public comments on the draft documents, in consultation with NMFS. NMFS has the final authority for determining NEPA compliance as part of the process of approving, disapproving or partially approving the council's actions. The NEPA process should be integrated into other planning and review procedures under the Magnuson-Stevens Act to the extent possible. NMFS should provide assistance throughout the NEPA process, as requested by the council.

3. By statute, the Department of Justice has the primary and plenary authority for handling litigation against NMFS, its parent the National Oceanic and Atmospheric Administration (NOAA), and the Secretary of Commerce. The councils lack legal standing to sue on their own or otherwise independently participate in pending litigation challenging any plan or regulation relating to fisheries under their jurisdiction. In addition, it is questionable whether the councils or their members are true parties as defendants in any case, given that NMFS and/or NOAA took the formal action being challenged, which is usually the promulgation of regulations or the announcement of actions under a fishery management plan. However, to the extent that the Department of Justice, NMFS and NOAA agree, the councils could play a role in litigation, including settlement negotiations, through intra-governmental consultations with NMFS and NOAA and Department of Justice lawyers.

4. The Magnuson-Stevens Act establishes the primary substantive and procedural requirements with which the council must comply in carrying out its duties. The Magnuson-Stevens Act requires fishery management plans or amendments to be consistent with other applicable law, which means that the council's actions must also comply with the ESA and NEPA. To the extent that fishery management actions may affect listed species, the requirements of the ESA prevail over the terms of the Magnuson-Stevens Act wherever a conflict exists. In theory, there is no conflict between the procedures of the Magnuson-Stevens

Act and NEPA, and the procedures of both statutes can be implemented concurrently. The extent to which NEPA applies to actions under ESA is unsettled, but there is some authority that the ESA displaces NEPA.

INTRODUCTION AND PURPOSE OF REPORT

This report has been prepared under contract (Contract SSL-06) to the North Pacific Fishery Management Council. The scope of the report was determined by a Statement of Work which outlined a series of questions to be addressed.

LEGAL FRAMEWORK

I. The Magnuson-Stevens Act.

A. Background and Purpose.

The Magnuson-Stevens Act is the premier federal statute providing for the systematic management of fishery resources found in the extended internationally recognized ocean area known as the exclusive economic zone. 16 U.S.C. § 1802(11). In the coastal margin out to 200 nautical miles, the United States has exclusive jurisdiction to harvest and manage marine fisheries that either reside in the zone or traverse through it. 16 U.S.C. § 1811(a); Washington State Charter Boat Ass'n v. Baldrige, 702 F.2d 820 (9th Cir. 1983), cert. denied, 464 U.S. 1053 (1984). In addition, the Act asserts jurisdiction over Continental Shelf fishery resources in areas of the continental shelf and anadromous species, such as salmon, outside the exclusive economic zone, but not within another nation's waters. 16 U.S.C. § 1811(b). The system of management set up by the Magnuson-Stevens Act is comprehensive, to the exclusion of regulation by individual coastal states as to those fisheries for which management plans have been adopted in the exclusive economic zone, unless the state regulations apply to state-registered vessels and are consistent with the fishery management plan or the fishery management plans delegates management to the state. 16 U.S.C. § 1856(a)(3)(A), (B). The exclusive economic zone is measured from the seaward boundary of coastal states, e.g. three nautical miles except for Texas and the west coast of Florida where the boundary is nine miles. Within state boundaries, coastal states manage marine fisheries, unless preempted by specific federal action. 16 U.S.C. § 1856; Davrod Corp. v. Coates, 971 F.2d 778 (1st Cir. 1992).

The primary purpose for creating this regulatory system was to establish fishery management plans that will achieve, on a continuing basis, the optimum yield from each marine fishery and to rebuild any fishery deemed to be overfished. 16 U.S.C. § 1801(a)(6); Alliance Against IFQs v. Brown, 84 F.3d 343, 344-345 (9th Cir. 1996), cert. denied, Alliance Against IFQs v. Secretary of Commerce, 520 U.S. 1185 (1997).

To carry out this significant new national management function, the Magnuson-Stevens Act set up a unique process for making management decisions, including an unprecedented

administrative institution, the fishery management council, as part of the fishery management process overseen by the Secretary of Commerce. One of the purposes of the Act was--

> to establish Regional Fishery Management Councils to exercise sound judgment in the stewardship of fishery resources through the preparation, monitoring, and revision of [fishery management] plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which take into account the social and economic needs of the States[.]

16 U.S.C. § 1801(b)(5).

The North Pacific Fishery Management Council was one of eight created upon enactment of the Magnuson-Stevens Act in 1976. 16 U.S.C. § 1852(a)(1)(G). Unlike other councils, which have authority over fisheries in more than one state, the North Pacific Council has authority over the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska, the largest geographic area of any council. However, the membership of the North Pacific Council includes representatives from the states of Alaska, Washington, and Oregon.

The members of each council are either state or federal employees or individuals selected from the private sector who are paid a daily compensation amount based on civil service pay scales and are reimbursed for their expenses. 16 U.S.C. § 1852(d). Each council is authorized to appoint an executive director and a staff of full- and part-time employees. Council members (except federal employees) and their staff are not considered federal employees subject to regulations issued by the Office of Personnel Management. 50 C.F.R. § 600.120; 16 U.S.C. § 1852(f). The Secretary of Commerce is required to provide administrative and technical support services to a council and the Administrator of General Services supplies such offices, equipment, supplies, and services as he is authorized to furnish to any other agency or instrumentality of the United States. Id. Specific rules of conduct apply to Council members and their staff. 50 C.F.R. § 600.220. Council members must also meet financial disclosure and recusal requirements set forth in the Act. 16 U.S.C. § 1852(j).

Each council is required to determine its own method of organization and to prescribe practices and procedures for carrying out its functions under the Magnuson-Stevens Act. 16 U.S.C. § 1852(e); 50 C.F.R. § 600.115. The Federal Advisory Committee Act does not apply to the councils or to scientific and statistical advisory committees or advisory panels created to advise the councils. Instead, the Magnuson-Stevens Act contains procedural requirements that guide the functioning of the councils and the committees and panels each creates. 16 U.S.C. § 1852(i).

In summary, regional fishery management councils are statutory entities with a certain degree of independence from the Department of Commerce that carry out a federal function. The councils have enumerated statutory duties to fulfill that are prescribed by the Magnuson-Stevens Act and that must be carried out in a manner fully consistent with "other applicable

law," such as the Administrative Procedure Act (5 U.S.C. § 551 et seq.), NEPA, the ESA and any other relevant statute. 16 U.S.C. §§ 1853(a)(1)(A), 1853(a)(1)(C).

B. Council Functions Under the Magnuson-Stevens Act.[1]

The primary functions of the councils are set forth in section 302(h) of the Magnuson-Stevens Act. 16 U.S.C. § 1852(h). The councils are charged with the following duties, to be undertaken in accordance with the entire Act:

> (1) For each fishery under its authority that requires conservation and management measures, each council is to prepare and submit to the Secretary (A) a fishery management plan, and (B) amendments to each such plan that are necessary from time to time (and promptly whenever changes in conservation and management measures in another fishery substantially affect the fishery for which such plan was developed).
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> (2) Each council is to prepare and submit comments on any application for foreign fishing submitted to it by the Secretary of State, any application for a transshipment permit submitted to it by the Secretary of Commerce, and any Secretarial fishery management plan or amendment to any such plan prepared by the Secretary of Commerce.
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> (3) Each council is to conduct public hearings on the development of fishery management plans, amendments thereto, and on the administration and implementation of the provisions of the Act for any fishery under such council's jurisdiction.
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> (4) Each council shall submit reports requested by the Secretary of Commerce or any other report deemed appropriate by the council.
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> (5) Each council shall review on a continuing basis and revise as appropriate the assessments and and specifications made by it of the maximum sustainable yield and optimum yield from, the capacity and extent to which U.S. processors will process fish harvested from, and the total allowable level of foreign fishing from each fishery in its geographical area.
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> (6) Each council is to comment on and make recommendations concerning any activity undertaken, or proposed to be taken, pursuant to any Federal authority that may affect the habitat of any species under its jurisdiction.
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> (7) Each council shall conduct such other activities which are required by, or provided for in, the Magnuson-Stevens Act or which are necessary and appropriate to the foregoing functions.

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[1] An excellent summary of the fishery management process and the responsibilities of the councils and NMFS can be found in a July 2002 Report prepared by the National Academy of Public Administration entitled "Courts, Congress and Constituencies: Managing Fisheries by Default" (NAPA Report), available at www.napawash.org/publications.html by following the links therein to its title.

In the preparation of fishery management plans (and amendments), the councils are to be guided by mandatory and discretionary requirements for each plan or amendment and the National Standards set forth in the Act and further elaborated upon by NMFS in a set of regulations. 16 U.S.C. §§ 1853(a) and (b), 1851; 50 C.F.R. § 600.305-355.

In addition, in various other provisions in the statute, the councils are given additional duties and responsibilities: the councils are to prepare and submit proposed regulations to implement fishery management plans, 16 U.S.C. § 1853(c); comment on FMPs prepared by the Secretary, 16 U.S.C. § 1854(c); prepare FMPs, FMP amendments, and proposed regulations for any stock determined to be overfished by the Secretary, 16 U.S.C. § 1854(e); request the taking of emergency action, 16 U.S.C. § 1855(c); establish fishery negotiation panels, 16 U.S.C. § 1855(g); request or prepare fishing capacity reduction programs, 16 U.S.C. § 1861a(b); assist in the implementation of a standardized fishing vessel registration and information management system, 16 U.S.C. § 1881(a); and recommend special information collection programs, 16 U.S.C. § 1881a(a).

The North Pacific Council has further duties specified in the Magnuson-Stevens Act and related statutes, including establishing a western Alaska community development quota program for Bering Sea fisheries, 16 U.S.C. § 1855(i)); preparing a fisheries research plan for all fisheries under the Council's jurisdiction, 16 U.S.C. § 1862(a)); creating a bycatch reduction incentive program, 16 U.S.C. § 1862(f)); and reporting on and recommending measures with respect to various aspects of the American Fisheries Act (Pub. L. 105-277, Oct. 21, 1998).

Finally, pursuant to Pub. L. No. 106-544, Sec. 209 of H.R. 5666 (114 Stat. 2763A-176) (2000), the Secretary of Commerce was directed to implement the biological opinion and reasonable and prudent alternatives for protection of the Steller sea lion population that may be affected by fishing activities under groundfish fishery management plans off Alaska by utilizing "the processes and procedures of the regional fishery management councils as required by the Magnuson-Stevens Act." 114 Stat. 2763A-177. In effect, Congress directed that measures to prevent jeopardy to Stellar sea lions under the ESA be considered by the North Pacific Council in essentially the same manner as any fishery management measures and then be approved (or disapproved) by the Secretary of Commerce.

As noted in the NAPA Report, the councils' membership, staff, and supporting committees are not large enough nor were ever intended to engage in extensive data-collection and analysis. These tasks are undertaken by regional science centers managed by NMFS. NMFS provides data, stock assessments, socio-economic information, computer and other analyses, and other information to the councils during the fishery management process.[2] Moreover, the councils rely upon NMFS for administrative support in carrying out many of their duties, because of their small staffs.

The manner in which the councils and NMFS interact on routine fishery management issues is set forth in a publication entitled "Operational Guidelines: Fishery Management Plan

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[2] See Chapter Three (Fishery Regulatory Process), NAPA Report.

Process" prepared by NMFS (Revised May 1, 1997) (Guidelines).[3] The Guidelines include the requirements of other related statutes, including the Administrative Procedure Act; Regulatory Flexibility Act (5 U.S.C. § 5315 et seq.); Paperwork Reduction Act of 1980 (Pub. L. 96-511, 94 Stat. 2812 (codified as amended in scattered sections of 5, 20, 30, 42 and 44 U.S.C.)); Executive Orders No. 12,612 (52 Fed. Reg. 41,685 (Oct. 26, 1987)), No. 12630 (53 Fed. Reg. 8,859 (Mar. 15, 1988)), and No. 12866 (58 Fed. Reg. 51,735 (Oct. 4, 1993)); Endangered Species Act of 1973; Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 et seq.); Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451-1454); as well as the Magnuson-Stevens Act. This publication has not been promulgated as a regulation nor adopted as an administrative order. However, the Operational Guidelines provide detailed guidance on how NMFS believes the fishery management process should work on a routine basis. These Guidelines, along with the Statement of Organization, Practices and Procedures that must be published by each council (50 C.F.R. § 600.115) and all related statutes and regulations, set the parameters within which a council carries out its responsibilities under the Magnuson-Stevens Act.

C. Secretarial Functions Under the Magnuson-Stevens Act.

For the purposes of this report, the key relevant functions of the Secretary of Commerce, which have largely been delegated to NMFS, are contained in Sections 304, 305, and 311 of the Magnuson-Stevens Act. 16 U.S.C. §§ 1854, 1855, 1861. NMFS must review any fishery management plan (or amendment) transmitted by a council to determine if it is consistent with the national standards, the other provisions of the Magnuson-Stevens Act, and any other applicable law. Following review, the plan or amendment is to be approved, disapproved, or partially disapproved within 30 days after the close of the public comment period for the plan or amendment. If disapproved in whole or in part, NMFS must specify to the council the nature of the inconsistencies and recommend how the plan or amendment should be changed to conform to applicable law. 16 U.S.C. § 1854(a). If NMFS fails to notify the council within the 30 day period, the plan or amendment is deemed approved. Under this provision, NMFS has the final word on whether a transmitted plan or amendment is consistent with applicable law, not the council.

NMFS is also to review proposed regulations transmitted by the council to ensure these are consistent with the plan or amendment, the provisions of the Magnuson-Stevens Act, and other applicable law. If so consistent, NMFS may publish the proposed regulations, with any technical changes deemed necessary for public comment. If not so consistent, NMFS is to make recommendations to the council about changes in the regulations to make them consistent. Final regulations are to be published 30 days after the close of the comment period on the proposed regulations. 16 U.S.C. § 1854(b).

NMFS may repeal or revoke a fishery management plan only if the responsible council approves the repeal or revocation by a three-quarters majority of the voting members of that council. 16 U.S.C. § 1854(h).

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[3] The Guidelines are available from the NOAA website at http://www.nmfs.noaa.gov/sfa/domes_fish/GUIDELINES.PDF.

NMFS has authority to prepare its own fishery management plan or amendment if a council fails to develop and transmit a plan or amendment within a reasonable period of time. 16 U.S.C. § 1854(c). Such a plan or amendment, however, may not include a limited access program unless a majority of the voting members of the responsible council first approves the program. NMFS is also responsible for annually reporting to Congress on the status of fisheries subject to management under the Magnuson-Stevens Act and determining whether any fishery is approaching a condition of being overfished. 16 U.S.C. § 1854(e). If a fishery is, at any time, determined as overfished, NMFS must notify the appropriate council and request that action be taken to end overfishing. Within one year, either NMFS or the council must prepare a plan or amendment to end the overfishing and rebuild the affected stocks of fish.

NMFS has the general responsibility to carry out any fishery management plan or amendment that has been approved. NMFS is given the authority to publish any regulations that may be necessary to carry out its responsibilities under the Magnuson-Stevens Act. 16 U.S.C. § 1855(d).

Finally, NMFS is responsible for enforcement of the Magnuson-Stevens Act and all implementing regulations. 16 U.S.C. § 1861(a).

Judicial decisions have stated that the Secretary (or NMFS) must exercise the necessary discretion and judgment in determining whether a particular plan or amendment complies with the requirements of the Magnuson-Stevens Act and other applicable law. Alliance Against IFQs v. Brown, 84 F.3d 343, 350 (9th Cir. 1996), cert. denied sub nom. Alliance Against IFQs v. Secretary of Commerce, 520 U.S. 1185 (1997). The decision of the Secretary (or NMFS) approving a plan or adopting a regulation may only be invalidated in court if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Parravano v. Babbitt, 861 F.Supp. 914 (N.D.Cal. 1994), aff'd sub nom. Parravano v. Masten, 70 F.3d 539 (9th Cir. 1995), cert. denied sub nom. Parravano v. Babbitt, 518 U.S. 1016 (1996).

D. Requirement That FMPs Be Consistent With Other Law.

NMFS cannot approve any fishery management plan that is not consistent with Magnuson-Stevens Act and other applicable law. Parravano, 70 F.3d at 544 (Indian treaty fishing rights constitute other applicable law that must be observed in preparing a fishery management plan); Northwest Environmental Defense Center v. Brennen, 958 F.2d 930, 937 (9th Cir. 1992) (consistency with coastal zone management plan required); Ramsey v. Kantor, 96 F.3d 434 (9th Cir. 1996) (Ramsey) (NMFS' decision on fishery management plans subject to both NEPA and ESA); Greenpeace Action v. Franklin, 14 F.3d 1324 (9th Cir. 1992) (NEPA and ESA apply to determination of total allowable catch of pollock in the Gulf of Alaska). The Guidelines make clear that NMFS has determined that both NEPA and the ESA are "applicable law." Thus, as a practical matter, the Council may recommend any fishery management measure it pleases, even measures that do not satisfy either the Magnuson-Stevens Act or other applicable law. However, if it does, NMFS is obligated to disapprove any such measure. Consequently, responsible implementation of the Magnuson-Stevens Act requires a council to make certain that its recommended measures are consistent with the Magnuson-Stevens Act and all other applicable law at the time it makes its recommendations to NMFS.

Failure to ensure that the preparation of a fishery management measure is consistent with other applicable law is likely to be both a violation of the Magnuson-Stevens Act and of the other applicable statute. For example, a fishery management measure that has not been properly reviewed pursuant to the procedural requirements of NEPA or that is likely to result in jeopardy to a species listed under the ESA cannot be approved by NMFS and will be found unlawful in court, if they were. And, with respect to whether a particular plan or amendment is so consistent, the judgment of NMFS predominates over the council's because the statutory authority to make the judgment call was given to the Secretary of Commerce by Congress.[4]

It is clear that a council bears the same responsibility for taking actions that are consistent with the Magnuson-Stevens Act and other applicable law as NMFS. The fishery management system would not work as Congress intended if a council does not play an early and integral role in making certain, from the outset, that all applicable laws are observed in carrying out the council's duties under the Magnuson-Stevens Act. In fact, the Guidelines make clear that NMFS expects that all issues arising from the application of other statutes in the fishery management process will be identified and resolved early in the process, at the council level. Put another way, a council cannot ignore any applicable Federal law when making recommendations about appropriate fishery management measures to NMFS. If a council does, then NMFS is obligated to disapprove any such measure or take other action, such as under the ESA, to comply with applicable law.

E. Previous Legal Opinions As to Status of Councils.

In the past, the Office of Legal Counsel (OLC) of the Department of Justice has been requested to interpret the legal status of the councils for various purposes. The authority of the OLC to render legal opinions derives from the authority of the Attorney General under the Judiciary Act of 1789 to render legal opinions on questions of law when requested to do so by the President or heads of executive departments. 28 U.S.C. §§ 511-513. That duty has been assigned to the OLC by the Attorney General. 28 U.S.C. § 510; 28 C.F.R. § 0.25.

In 1977, the OLC concluded that councils are within the concept of an entity which is an "integral part" of a Federal agency. 1 Op. Off. Legal Counsel 239, 1977 OLC LEXIS 58 (1977). Thus, councils are Federal agencies under the Federal Torts Claims Act and are protected by the immunity provided by the Constitution and relevant Federal statutes. The opinion further stated that the councils' "function is to assist the Secretary of Commerce in his official endeavors." 1 Op. Off. Legal Counsel at 240.

The related questions of whether the councils possessed litigating authority independent of the Department of Justice and whether the councils could sue the Secretary of Commerce for decisions made under the Magnuson-Stevens Act were put to the OLC in 1980. 4B Op. Off. Legal Counsel 778, 1980 OLC LEXIS 88 (1980). The OLC found that the councils were not

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[4] Nonetheless, the authors of this report are fully aware that the standard practice of NMFS has been to approve nearly all of the councils' recommendations. Only rarely does NMFS refuse to go along with what a council recommends.

given sufficient legal authority to have independent litigation counsel.[5] That opinion described the councils' functions and relationship to the Secretary of Commerce as follows:

> The Councils, however, have neither express statutory authority nor that freedom from executive control that would give rise to some inference supportive of their having independent litigating authority. However independent the Councils may be in their day-to-day operations, ultimate authority over a majority of their membership, budgets, and their major area of concern --the fishery management plans --remains with the Secretary or other federal agencies. The Councils perform the basic research, hold hearings, draft the plan for their area, and propose regulations. 16 U.S.C. §§ 1852(h), 1853(c). It is the Secretary, however, to whom the drafts and proposals are submitted and it is the Secretary who either approves the management plan or amends it to his satisfaction. 16 U.S.C. § 1854, See State of Maine v. Kreps, 563 F.2d 1052, 1055-56 (1st Cir. 1977). It is also the Secretary who reviews the regulations to insure their legality and who implements them. 16 U.S.C. § 1855(c).[6] That the Department of Commerce has found it most efficient to allow the Councils maximum leeway, see 50 C.F.R. § 601.1 (1979),[7] does not change an analysis based on the statutory framework. The Councils are subordinate parts of the Department of Commerce. Any attempt on their part to sue the Secretary would therefore raise a substantial constitutional question.

4B Op. Off. Legal Counsel at 782 (footnotes omitted).

Thus, the councils have been determined to be federal agencies, or an integral part thereof, for the purposes of certain federal laws, but with limited authority as spelled out in the Magnuson-Stevens Act. Whether (and the extent to which) a particular statute applies to the councils is dependent on the language and purpose of that statute.

F. Litigation History Of North Pacific Council's Actions.[8]

By and large, fishery management actions approved by the North Pacific Council have been successfully defended in court. However, that experience changed in recent litigation over the Steller sea lion, where the court's several rulings primarily dealt with NMFS' failure to comply with the ESA and NEPA. Greenpeace v. National Marine Fisheries Serv., Case No.

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[5] The issue of the council's role in litigation will be addressed in more detail in the Discussion section (Issue 3) of this report, supra.

[6] Now codified at 16 U.S.C. § 1854(b).

[7] No longer in effect.

[8] See generally, Chapter Two (Fisheries Litigation) of the NAPA Report.

C98-492Z, with decisions reported at 55 F.Supp.2d 1248 (W.D.Wash. 1999) (Greenpeace I), 80 F.Supp.2d 1137 (W.D.Wash. 2000), and 106 F.Supp.2d 1066 (W.D.Wash. 2000).[9] In that case, the federal judge in Seattle, Washington ruled that NMFS' decision not to prepare a comprehensive environmental impact statement discussing the adverse affect of the groundfisheries on the sea lion was a violation of NEPA and enjoined all fishing in designated critical habitat of the species. The judge also determined that the biological opinion prepared by NMFS under the ESA did not adequately analyze how the core management measures, such as selecting the acceptable biological catch, overfishing limits, and total allowable catch, might impact endangered species. The case is still ongoing and, at the time this report was written, summary judgment motions on the adequacy of the latest attempts at compliance with the ESA were pending before the court. The NEPA review is still in progress. At its June, 2002 meeting, the council adopted a second draft of alternatives for the programmatic environmental impact statement that is being reviewed by NMFS.

The Steller sea lion case is also notable because of efforts by Congress to enact legislation that directly influenced the case, in terms of application of the court's ruling and the procedure for developing future fishery management measures that comply with the ESA.

In Ramsey v. Kantor, 96 F.3d 434 (9th Cir. 1996), the Ninth Circuit held that the Secretary's failure to disapprove the Southeast Alaska salmon harvest plans prepared by the Alaska Department of Fish and Game required NEPA review. Id. at 445. The court also held that the issuance of an incidental take statement under Section 7 of the ESA for the Columbia River salmon fisheries that harvested listed species was a major federal action for purposes of NEPA, and that NMFS was required to comply with NEPA before issuing the incidental take statement. Id. at 444. Following the Ramsey decision, NMFS began work on a coastwise environmental impact statement for Pacific salmon fisheries. A draft programmatic environmental impact statement was available for public review on August 23, 2002.

In American Oceans Campaign v. Daley, 183 F.Supp.2d 1 (D.D.C. 2000), environmental assessments prepared for designating Essential Fish Habitat under the Magnuson-Stevens Act, were found to be inadequate. Among other things, the court found that the environmental assessments failed to consider the factors specified in NAO 216-6 for determining whether an environmental impact statement was necessary, failed to consider reasonable alternatives, and failed to fully explain the environmental impact of proposed actions and alternatives. The court enjoined implementation of the Essential Fish Habitat amendments to various fishery management plans pending NEPA compliance. Id. at 20-21. As a result of the decision, NMFS is preparing an environmental impact statement for all Essential Fish Habitat amendments, including for fisheries under the jurisdiction of the North Pacific Council.

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[9] An extensive discussion and analysis of NMFS' efforts in implementing the Magnuson-Stevens Act and the ESA can be found in Halpern, "Steller Sea Lions: The Effects of Multi-Statute Administration On the Role of Science in Environmental Management," 19 U.C.L.A. J. ENVTL. L. & POLICY 449 (2001/2002).

II. The Endangered Species Act.

Of the three statutes discussed in this memorandum, the Endangered Species Act of 1973 (ESA) is perhaps the least well understood as it affects the federal fishery management planning process. This section describes the background and purpose of the ESA, the major provisions aimed at achieving these purposes, and the role of the regional fishery management councils in implementation of these provisions, with particular attention to the Section 7 consultation process.

A. Background and Purpose.

The ESA has been described as "the most revered and reviled of federal environmental laws.[10] The Act contains provisions of "unparalleled stringency," in contrast to many other natural resources statutes that require implementing agencies to balance resource protection values against the social and economic needs of people.[11] The Act is based on the premise that "various species of fish, wildlife, and plants in the U.S. have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation," and that numerous species of value to humankind are at risk of extinction. 16 U.S.C. § 1531(a).

The purposes of the Act as described in its 1973 enactment are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved," to provide a program for the conservation of such endangered and threatened species, and to take such steps as may be appropriate to achieve the purposes of the numerous wildlife conservation treaties and conventions to which the U.S. is a party. Id., 16 U.S.C. § 1531(b). The comprehensive nature of the Act is reflected in Section 2(c), which declares it to be the policy of Congress that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." 16 U.S.C. § 1531(c). The nature of these duties is further elaborated in Section 7, discussed below.

The ESA has ten major sections. The principal provisions follow Sections 2 and 3, which present the congressional findings and purposes and set out definitions of key terms used in the statute. Section 4 establishes the procedures and criteria for listing a species as endangered or threatened. 16 U.S.C. § 1533. Section 5 delegates the authority to acquire land for species conservation. 16 U.S.C. § 1534. Section 6 creates procedures and incentives for cooperation with the states, while Section 8 encourages federal cooperation with foreign governments to protect listed species. 16 U.S.C. §§ 1535, 1537.[12] Of particular interest to the questions raised by the North Pacific council, Section 7 sets out the duties imposed on federal agencies to

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[10] John C. Nagle & J.B. Ruhl, THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT 117 (New York: Foundation Press, 2002).

[11] Id.

[12] State endangered species programs that are more protective are expressly preserved from federal preemption. ESA, Section 6(f), 16 U.S.C. § 1535(f).

conserve listed species and not to jeopardize the continued existence of a listed species or its habitat. 16 U.S.C. § 1536. Section 9 prohibits the killing, harming, smuggling, or any other means of "taking" an endangered species, while Section 10 describes exceptions to this takings prohibition and authorizes the issuance of permits allowing takes otherwise prohibited by Section 9. 16 U.S.C. §§ 1538, 1539. The enforcement and penalty provisions of the Act, as well as its provision for citizen suits against the Secretaries or against persons violating the takings prohibition, are spelled out in Section 11. 16 U.S.C. § 1540.

Although all federal agencies are called upon to use their authorities to meet the goals of the Act, Congress gave primary responsibility to the Secretary of the Interior and the Secretary of Commerce. The Secretaries of Interior and Commerce have in turn delegated their authority to the U.S. Fish & Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). 50 C.F.R. § 402.01(b). This division of responsibilities reflects the executive branch Reorganization Plan No. 4 of 1970, National Oceanic and Atmospheric Administration, under which the Secretary of Commerce has responsibility for most marine species, including anadromous fish, the species of the order *Cetacea* (whales and dolphins) and the suborder *Pinnipedia* (seals and sea lions) except walruses. 35 Fed. Reg. 15,627, 84 Stat. 2090 (1970). The FWS has responsibility for the polar bear, walrus, sea otter, manatee, dugong, and sea birds.[13] NMFS and the FWS share responsibility for sea turtles, depending on whether they are present on land or in the water, and for Pacific and Atlantic salmon.[14]

1. Listing Decisions.

The listing process is the means by which particular species of animals and plants are designated as either "endangered" or "threatened" and are thereby brought under the Act's protections. A species is endangered if it "is in danger of extinction throughout all or a significant portion of its range" (other than insects determined to constitutes pests), and is "threatened" if it "is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." ESA, Section 3(6), (20); 16 U.S.C. §§ 1532(6),(20). The criteria and procedures for applying these definitions to specific species are described in Section 4. Listing decisions may be initiated by either the FWS or NMFS, depending on the species, or by petition from an interested person. Petitions to remove a species from the list are also considered, as are petitions to "upgrade" a species from threatened to endangered. For example, the eastern North Pacific stock of the North Pacific gray whale was one of the first marine species to be removed from the endangered species list, based on a petition from the Northwest Indian Fisheries Commission and others. See Metcalf v. Daley, 214 F.3d 1135 (9th Cir. 2000). The Steller sea lion, listed as threatened in 1990, was reclassified into

[13] The listed species over which the Secretary of Commerce has jurisdiction are presented in 50 C.F.R. § 223.102 (2001).

[14] Hawksbill Sea Turtle v. Federal Emergency Mgmt. Agency, 126 F.3d 461, 470 (3rd Cir. 1997) ("[W]hen the turtles are swimming . . . Commerce bears regulatory responsibility, and when the turtles return to the beach, the regulatory baton passes to Interior."); 50 C.F.R. § 223.102(d) (2001).

two "distinct population segments" and the western population was upgraded from threatened to endangered in 1997.[15]

The FWS and NMFS are required to designate critical habitat for a species at the same time the species is listed "to the maximum extent prudent and determinable." 16 U.S.C. §§ 1533(a)(3), (b)(6)(C).[16] Decisions regarding critical habitat for a listed species must be based on the best scientific data available, but the Act requires the agencies to consider as well the economic or other impacts of specifying a particular area as critical. ESA, Section 4(b)(2); 16 U.S.C. §1533(b)(2). Areas may be excluded from the designation if the agency determines that the benefits of the exclusion outweigh the benefits of specifying the area as critical habitat, unless the exclusion of such area will result in the extinction of the species. Id. The decision not to list or not to designate critical habitat can be challenged in court under the citizen suit provision of the ESA. 16 U.S.C. § 1540(g). See Cook Inlet Beluga Whale v. Daley, 156 F.Supp.2d 16 (D.D.C. 2001) (NMFS decision not to list the Cook Inlet beluga whale was not arbitrary or capricious). Courts have differed on whether NEPA applies to the determination of critical habitat.[17]

2. Recovery Plans.

The 1978 amendments to the ESA added a requirement to the Act that the FWS and NMFS develop and implement recovery plans for the conservation and survival of endangered and threatened species. 16 U.S.C. § 1533(f)(1). The plans must describe site-specific management actions needed to achieve the species' conservation and survival, objective and measurable criteria which, once met, would result in the removal of the species from the list, and estimates of the time required and the costs to implement the measures needed to achieve the plan's goals. Id.[18] The agencies are required to publish the recovery plans for public comment before they become final and to consider all information presented to them prior to final approval of a plan or a new or revised recovery plan. Id., 16 U.S.C. §1533(f)(4), (5). There has been little litigation concerning the recovery planning requirements.[19] The case law suggests that the

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[15] 62 Fed. Reg. 24,345 (May 5, 1997).

[16] NMFS denied a petition to revise the critical habitat designation for the Pacific population of north right whales to include an area in southeastern Bering Sea in February 2002. 67 Fed. Reg. 7,660 (Feb. 20, 2002). NMFS determined in 2001 that a petition to designate critical habitat for the Western Arctic stock of bowhead whales in the Beaufort Sea off the North Slope of Alaska out to 170 miles offshore presented substantial scientific information that the action was warranted. 66 Fed. Reg. 28,141 (May 22, 2002).

[17] On the application of NEPA, compare Catron County Board of Commissioners v. United States Fish & Wildlife Serv., 75 F.3d 1429 (10th Cir. 1996) (NEPA inapplicable) and Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 516 U.S. 1042 (1996), reh'g denied, 516 U.S. 1185 (1996) (NEPA applicable).

[18] NMFS has prepared recovery plans for several of the marine species listed under the ESA. The recovery plans can be accessed via the web site of the Office of Protected Resources, www.nmfs.noaa.gov/prot_res.

[19] See Michael J. Bean & Melanie J. Rowland, THE EVOLUTION OF NATIONAL WILDLIFE LAW 211 (3rd ed. 1997).

agencies have a duty to prepare recovery plans but the discretion on how and whether to implement them.[20]

The FWS and NMFS have an interagency policy on recovery planning aimed at enhancing recovery plan development and implementation with a view toward "minimiz[ing] social and economic impacts consistent with timely recovery of species listed as threatened or endangered." 59 Fed. Reg. 34,272 (July 1, 1994). The policy describes the process for preparing recovery plans and the qualifications of recovery team members. Team members will be selected based on their expertise, and some members may have an interest in the economic and social impacts of recovery. The policy incorporates by reference the Services' prior commitment of developing recovery plans within two and a half years after final listing. According to the policy, the Services are required to give all affected interests an opportunity to participate in the recovery plan development and implementation process. The latter is to be accomplished through the development of a Participation Plan involving all "appropriate agencies and affected interests in a mutually developed strategy to implement one or more specifically designated recovery actions. Participation plans should ensure that a feasible strategy is developed for all affected interests while providing realistic and timely recovery of the species." Id. at 34,273.

Two years prior to the adoption of the interagency policy on recovery planning, NMFS' Office of Protected Resources (OPR) issued its own set of guidelines for recovery planning for species under the jurisdiction of NMFS (including depleted marine mammal species or stocks). The OPR guidelines describe the process for appointing a plan coordinator, drafting and circulating the plan for public and federal agency comment, including notice in the Federal Register, and for revising and amending the plans. They also describe the required content of recovery plans and the ongoing involvement of the recovery team in implementation.[21] The OPR guidelines do not mention an explicit process for coordination with the development of fishery management plans, but this aspect of the process is addressed to some degree in the Guidelines for the FMP Process, discussed above in I.B and below in II.B.3.

Recovery plans can be an important source of information to the regional fishery management councils as they indicate the kinds of information that may be available regarding the potential impacts of fisheries upon listed species and the research that is needed to improve that information base. This information is important for the councils to be aware of if they wish to participate meaningfully in the preparation of biological assessments and the review of biological opinions prepared under Section 7, which is discussed below. Council members' participation in the preparation and review of recovery plans may be a valuable antecedent to effective participation in the consultation process on FMPs.

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[20] Id. at 212.

[21] NMFS, Office of Protected Resources, Recovery Planning Guidelines (Sept. 1992), available at www.nmfs.noaa.gov/prot_res/readingrm/recoverguide/RECVPLAN.PDF.

3. Section 4(d) Regulations and Issuance of Section 10 Permits.

a. Section 4(d) Regulations.

When any species is listed as threatened, Section 4 requires the FWS and NMFS to issue such regulations as they deem "necessary and advisable to provide for the conservation" of threatened species, including regulations that prohibit any or all of the activities that Section 9 (the takings prohibition) prohibits for endangered species. 16 U.S.C. § 1533(d). This authority is in addition to the power under Section 11(f) to promulgate regulations "as may be appropriate to enforce" the Act.

In recent years, regulations with respect to fisheries and their potential impacts on listed species have been promulgated in response to a biological opinion prepared under the ESA's interagency consultation provision, Section 7. However, NMFS and the FWS have the authority to regulate private activities like fishing under Sections 4(d) and 11.

For example, following a lengthy process including preparation of an EIS and a supplemental EIS, on June 29, 1987, NMFS promulgated regulations under Section 4(d) and 11(f) requiring shrimp trawlers in the Gulf of Mexico and South Atlantic to reduce the incidental take and mortality of sea turtles by installing certified turtle excluder devices ("TEDs") in each of their trawls.[22] In Louisiana ex rel. Guste v. Verity, 853 F.2d 322 (5th Cir. 1988), the State of Louisiana claimed that the TEDs regulations were invalid because they were not supported by scientific information and would not save a listed species from extinction in view of the other known sources of sea turtle mortality. The court rejected this claim, holding that the authority of Section 4(d) to promulgate regulations prohibiting the taking of any threatened species of fish or wildlife supplements the taking prohibition in Section 9 and is not conditioned upon a showing that the regulation will restore the species. Louisiana did not challenge the authority to promulgate the regulations, only whether there was sufficient evidence to support them.[23]

NMFS in recent years seems to have stepped away from Section 4(d) as the principal tool for taking regulatory actions addressing sea turtle takes in shrimp trawls. Prompted by increases in turtle stranding rates, NMFS has refined and expanded the TEDs regulations through Section 7 biological opinions prepared in 1994, 1996, and 1998 in connection with Gulf of Mexico fishery management plans, and a 2001 environmental assessment on proposed technical changes to TEDs. This process led to the publication of proposed rules for public comment on increasing the size of the TED opening to allow the release of large leatherback and adult loggerhead and green sea turtles. 66 Fed. Reg. 50,148 (Oct. 2, 2001).[24]

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[22] Id. at 223.

[23] Michael J. Bean & Melanie J. Rowland, THE EVOLUTION OF NATIONAL WILDLIFE LAW at 224, 225-226. NMFS's regulations are published at 50 C.F.R. §§ 223.205-.207 and 224.104(c)(2001).

[24] Delays in completing this regulatory action, however, have resulted in environmental groups filing on August 7, 2002 a 60-day notice of intent to sue for violations of Section 7 and 9 of the ESA.

b. Section 10 Research and Incidental Take Permits.

Section 10 of the ESA authorizes the FWS or NMFS to issue permits to take listed species for scientific purposes or to enhance the propagation survival of the affected species. 16 U.S.C. § 1539(a)(1)(A). This provision has recently found application to the fisheries context. NMFS issued in January 2002 a three-year scientific research permit to the director of the Southwest Fisheries Science Center's Honolulu Laboratory for the testing of longline fishing gear and techniques to avoid catching sea turtles on board vessels permitted to engage in the Pacific pelagics fisheries. See also 67 Fed. Reg. 49,009 (July 29, 2002) (NMFS notice of application and request for public comments on scientific research permit to take sea turtles under the ESA).[25] This action appears to indicate that a Section 10 permit can be issued to a federal entity even if the activity covered by the permit is also the subject of a Section 7 biological opinion, at least if the purpose of the takes is to research gear modifications that will reduce takes in commercial fisheries.

Section 10 also provides a mechanism to shield private and government actors from Section 9's prohibition against taking a listed species and enforcement actions under Section 11. The 1982 amendments to the ESA added exemptions to the takings prohibition of Section 9 for incidental takings of listed species. Because "taking" is broadly defined under the Act and FWS/NMFS regulations, including actions that do not involve direct physical injury nor the intent to cause injury, and actions that cause harm through habitat modification, the prohibition covers a wide range of activities.[26]

In Section 10, Congress authorized the Services to permit activities that would otherwise constitute prohibited takings of endangered species. These activities, however, must be "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B). The applicant for such a permit must submit a conservation plan to the appropriate agency that specifies the impact the taking activity will have on the affected species, steps the applicant will take to minimize and mitigate these impacts, and the reasons the applicant cannot pursue alternative actions to the proposed takings. 16 U.S.C. § 1539(a)(2)(A).

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[25] NMFS Office of Protected Resources prepared an environmental assessment and made a finding of no significant impact under NEPA in connection with this permit. Vessels fishing under this research permit for NMFS would otherwise be prohibited from fishing for swordfish with pelagic longline gear in the affected waters under the terms of a March 2001 biological opinion on the W. Pacific pelagics FMP. The research permit itself was the subject of a FWS Section 7 consultation and biological opinion with respect to the short-tailed albatross. This resulted in additional terms and conditions and reasonable and prudent measures.

[26] Section 3 defines "take" as to "harass, harm, pursue, hunt, shoot, would, kill, trap, capture, or collect, or to attempt to engage in any such conduct." FWS has interpreted the term "harm" to include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding, or sheltering. 50 C.F.R. § 17.3 (2002). See supra, note 19, Bean & Rowland at 234. Bean and Rowland point out that many common activities could entail unintentional but incidental takings and are thus covered, including commercial fishing, among others. Id.

The FWS and NMFS issue incidental take permits through a notice-and-comment process.[27] The Act requires them to issue the permit if they find after an opportunity for public comment that the taking will indeed be incidental and that the taking "will not appreciably reduce the likelihood of the survival and recovery of the species in the wild."[28] They must also find that the applicant will (1) to the maximum extent practicable, minimize and mitigate the impacts, (2) ensure that available funding is adequate for the conservation plan, and (3) meet any measures required by the Secretary. 16 U.S.C. § 1539(a)(2)(B). The permit must contain terms and conditions that the agency deems necessary, including reporting requirements. Noncompliance with these terms and conditions can lead to permit revocation and exposure to liability under Section 9.

The most important criterion for issuance of an incidental take permit is NMFS' determination that the proposed taking will not "appreciably reduce the likelihood of the survival and recovery of the species in the wild." 50 C.F.R. § 222.307(c). NMFS can impose conditions on the permit to ensure this criterion is met. If a general incidental take permit is issued to a group, an individual who wishes to conduct the same activity must apply to NMFS for a certificate of inclusion. Id. at § 222.307(f). One interesting feature of the permit program is the assurance provided to the permit holder that in the case of changed circumstances, when the conservation plan is being properly implemented, NMFS will not require the permit holder to adopt any conservation and mitigation measures in addition to those in the plan without the permit holders' consent. If additional measures are deemed necessary to respond to unforeseen circumstances, NMFS may not increase the commitment of additional financial compensation or additional restrictions on the use of natural resources otherwise available under the original terms of the conservation plan without the permit holder's consent. Such permit assurances, however, are not available to federal agencies. 50 C.F.R. § 222.307(g).

B. Section 7: Federal Agency Duties and the Consultation Process

1. Overview of Federal Agency Duties.

As the above discussion indicates, the core responsibilities under the ESA for listing, recovery planning, and promulgating protective regulations rest with the FWS and the NMFS. All federal agencies, however, are required to undertake actions to meet the goals of the Act. These obligations are contained in Section 7 of the Act. 16 U.S.C. § 1536.

Section 7 contains the principal mechanism by which a federal agency or those action pursuant to federal authorization (i.e., "applicants" for federal licenses or permits) may be

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[27] NMFS' regulations governing incidental take permits for endangered or threatened species are promulgated at 50 C.F.R. § 222.307 (2002). Additional guidance on the permit process is given in the 1996 FWS and NMFS Handbook for Habitat Conservation Planning and Incidental Take Permit Processing, a Final Addendum for which is published at 65 Fed. Reg. 35,242 (June 1, 2000).

[28] 50 C.F.R. § 222.307(c)(2)(iii)(2000). This is the same standard that applies under regulations implementing Section 7(a)(2), the prohibition of federal agency actions that may jeopardize a listed species. 50 C.F.R. § 402.02 (definition of jeopardize). See supra, note 19, Bean & Rowland at 235, noting that the Secretary may not issue an incidental take permit that jeopardizes the continued existence of an endangered species.

shielded from liability under the takings prohibition. In 1982, Congress recognized that certain federal actions that may satisfy the "no jeopardy or adverse modification" standard of section 7 may nevertheless result in the incidental taking of one or more members of a listed species.[29] The language of Section 7 was amended to require the Secretary to issue a written incidental take statement as part of the consultation process that species the impact of the taking on the affected species and the "reasonable and prudent measures" that the Secretary considers necessary or appropriate to minimize such impact and the terms and conditions with which the federal agency or applicant must comply. 16 U.S.C. § 1536(b)(4).

Section 7(a)(1) sets out the first of the federal "action agency's" obligations, an affirmative duty requiring the agency to "utilize [its] authorities in furtherance of the purposes of this Act by carrying out programs for the conservation" of species listed pursuant to Section 4. Section 7(a)(1) also imposes a special affirmative duty on the listing agencies, requiring the Secretary to "review other programs administered by him and utilize such programs in furtherance of the purposes of this Act." A possible illustration of an action meeting this affirmative conservation duty might entail the Secretary of Commerce utilizing his authority under the Marine Sanctuaries Act to create a national sanctuary in an ocean area used by one or more species of endangered whales for breeding or nursery grounds.[30] Similarly, the Secretary could use his authority to manage fisheries for Atlantic highly migratory fish species under the MSA in a manner that reduces risks to endangered or threatened species.

The second duty under Section 7 is a negative duty and applies with respect to specific actions an agency plans to undertake. Section 7(a)(2) requires all federal agencies to consult with the listing agencies on how to insure that any of its actions is not likely to jeopardize the continued existence of a listed species or adversely affect its critical habitat. This negative obligation, the jeopardy prohibition, is in addition to the prohibition against taking a listed species that applies to federal agencies as well as private parties under Section 9.

While the term "conservation" is defined broadly in the ESA,[31] the affirmative conservation duty of Section 7(a)(1) has been interpreted narrowly by most courts.[32] However,

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[29] See supra, note 19, Bean & Rowland at 236.

[30] The Hawaiian Islands Humpback Whale National Marine Sanctuary was created by Congress. See P.L. 102-587. The Secretary of Commerce, however, could enlarge the boundaries or increase the regulatory protection within the sanctuary, utilizing the authority of section 7 of the ESA as well as the National Marine Sanctuaries Act, 16 U.S.C. §§ 1431-1445a.

[31] Under the ESA, the terms "conserve," "conserving," and "conservation" mean "to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such measures and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking." ESA, Section 3(3); 16 U.S.C. §1532(3).

[32] See supra, note 10, Nagle & Ruhl at 191, citing, e.g., Center for Marine Conservation v. Brown, 917 F.Supp. 1128, 1149-50 (S.D.Tex. 1996) (NMFS did not violate Section 7(a)(1) in refusing to enact further restrictions on commercial shrimping to protect endangered sea turtles*);* Pyramid Lake Paiute Tribe of Indians v. United States

the broad language of this provision could be used by the NMFS and the regional fishery management councils programmatically, to identify effective actions to help listed species and their habitats in the course of developing management alternatives for fisheries, rather than waiting for consultations on specific management actions or on measures for the upcoming fishing season under Section 7(a)(2).

The duty to insure specific federal actions do not jeopardize listed species applies to the FWS and NMFS when they carry out their programmatic activities under other statutes such as the National Wildlife Refuge Act or the Magnuson-Stevens Act. Unlike Section 7(a)(1), this negative duty has been broadly interpreted by the courts, including recently in the context of marine fisheries, as the discussion below will illustrate. The FWS and NMFS have dual roles under the Act: as listing agencies with whom "action agencies" consult and as "action agencies" themselves, subject to the duty to insure no jeopardy to listed species by virtue of their actions. For the remainder of this section, the two roles will be referred to as the action agency and the consulting Service.

Thus, NMFS is both an action agency and a consulting service. It handles this dual role by delegating the functions of the consulting service to the Office of Protected Resources, usually at the regional office, and the functions of the action agency to the regional office of the Office of Sustainable Fisheries, or to the headquarters' Division of Highly Migratory Species.

2. The Consultation Process.

Section 7 spells out the procedures by which federal agencies must proceed in order to insure that their actions are not likely to jeopardize a listed species or result in the adverse modification of critical habitats.[33] The agency responsible for the action must consult with either the FWS or the NMFS if, in its own determination, its proposed action may affect an endangered or threatened species or critical habitat. Before the consultation, the action agency may prepare a biological assessment.[34] After the formal consultation is completed (within 90 days, unless extended by agreement), the consulting Service issues a biological opinion regarding the nature and extent of the potential effects on the listed species. 50 C.F.R. § 402.14(h).

Dep't of Navy, 898 F.2d 1410 (9th Cir. 1990) (the Navy did not violate Section 7(a)(1) in withdrawing water from the Truckee River for dust suppression in connection with flight training activities despite adverse effects on endangered fishes due to lower water levels); and Strahan v. Linnon, 966 F.Supp. 111 (D.Mass. 1997) (Coast Guard did not violate Section 7(a)(1) by refusing to impose speed limits on search and rescue vessels operating in waters occupied by northern right whale and other endangered marine species); but see Sierra Club v. Glickman, 156 F.3d. 606 (5th Cir. 1998), reh'g denied, 1998 U.S. App. LEXIS 33142 (5th Cir. 1998) (Agriculture Dept. violated Section 7(a)(1) in declining to take action to protect the Edwards Aquifer in Texas; agencies' duties under Section 7(a)(1) are specific and particular, to use "all methods and procedures which are necessary to bring any endangered species or threatened species" to the point of recovery).

[33] If a species has been proposed for listing, the agency must confer with the appropriate Service in order to meet its no jeopardy duty. 16 U.S.C. § 1536(a)(4). Under the Services' joint regulations, if an action may affect a species that has been proposed for listing, a conference is conducted rather than a consultation. 50 C.F.R. § 402.10.

[34] By regulation, a biological assessment is only required for "major construction activities." 50 C.F.R. § 402.12(b). However, biological assessments are often prepared by action agencies in order to provide the consulting Services with a basis for evaluating the likely effects of the action on listed species or critical habitat. Consultation Handbook at 3-10 and 11.

If the biological opinion concludes that the agency's proposed action is likely to jeopardize a protected species, the action agency must change its proposed action so that the jeopardy or adverse modification will not occur, unless the agency has obtained an exemption by the Endangered Species Committee constituted pursuant Section 7(e).[35] If it has no exemption, the agency is aided in modifying its prospective action by the consulting Service's suggestion of "reasonable and prudent alternatives," steps which it believes can be taken by the federal agency to avoid jeopardy. 16 U.S.C. § 1536(b)(3)(A).

Section 7(a)(3) provides a means by which private parties who are prospective applicants for a federal license or permit may request the licensing or permitting agency to consult with the appropriate Service. NMFS and FWS consultation regulations define an applicant as any person (as defined in Section 3(13) of the ESA) "who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the *action*."[36] The 402 regulations require the consulting Service to discuss with the Federal agency and any applicant the Service's review and evaluation of available information for the biological opinion and if requested, to make available to the agency the draft biological opinion. The applicant can then request a copy of the draft opinion from the federal agency and submit comments on it either directly to the consulting Service or through the federal agency. 50 C.F.R. § 402.14(g)(5).

If the consulting Service determines that the proposed action will result in the incidental taking of a listed species, the Service must provide the agency and the applicant, if any, with a written statement specifying the anticipated impact of the taking, the "reasonable and prudent measures" necessary to minimize such impacts, and the terms and conditions the agency or applicant must meet to give effect to these measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i). In making all of the determinations required by Section 7, the action agency and the consulting Service must use "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(d).[37] Agencies are required to reinitiate formal consultation if the extent of taking specified in the incidental take statement is exceeded, if new information

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[35] In theory, an action agency could disagree with the Service's biological opinion on whether the action as proposed would jeopardize the listed species, but if it does not comply with the opinion's incidental take statement, for example, the agency and its employees run the risk of incurring substantial civil and criminal penalties for knowingly taking a listed species. Bennett v. Spear, 520 U.S. 154, 170 (1997).

[36] 50 C.F.R. § 402.02 (emphasis added). The term "action" is defined in the 402 regulations to mean

> all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include . . . (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air."

Id. NMFS's interpretation of these regulations and the definition of the term "applicant" were reviewed by a federal magistrate in Hawaii Longline Ass'n v. National Marine Fisheries Serv., No. 01-765, 2002 U.S. Dist. LEXIS 7263 (D.D.C. Apr. 25, 2002), discussed later in this memorandum in II.B.3.

[37] NMFS and the FWS have issued a joint policy statement on Information Standards Under the ESA. 59 Fed. Reg. 34,271 (July 1, 1994).

reveals effects not previously considered, the action is modified that causes effects not previously considered, or if a new species is listed or critical habitat designated that may be affected by the federal action. 50 C.F.R. § 402.16.

While the Act itself prescribes the basic steps in the process, NMFS and the FWS have elaborated upon this basic scheme in their jointly-issued Part 402 regulations and in their Section 7 Consultation Handbook (Handbook).[38] The regulations encourage agencies to consolidate procedures under Section 7 with interagency cooperative procedures required under other statutes such as NEPA or the Fish and Wildlife Coordination Act and to include the results in the documents required by those statutes. 50 C.F.R. § 402.06. They also encourage early consultation to reduce the likelihood of conflicts between listed species or habitat and proposed actions that involve applications for federal licenses or permits. If early consultation is undertaken, the process results in a preliminary biological opinion which may later be confirmed as the final biological opinion once the applicant applies for the subject permit or license. 50 C.F.R. § 402.11.

The consultation process generally begins with the action agency's preparation of a biological assessment. 50 C.F.R. § 402.12. The biological assessment is used by the federal agency to determine whether to request formal consultation. Section 7(c) requires the agency to obtain information from the appropriate Service about the presence of listed species or proposed species within the area of the proposed action and to make its own assessment of the potential impacts. 16 U.S.C. § 1536(c). This subsection specifically authorizes federal agencies to undertake the biological assessment as part of its compliance with the National Environmental Policy Act (NEPA). Id. The Part 402 regulations allow a federal agency to designate a non-Federal representative to conduct an informal consultation or prepare a biological assessment. 50 C.F.R. § 402.08. This could be a permit or license applicant if one is involved, a state agency, or other entity interested in the proposed action.

The Handbook describes Section 7 as a cooperative process. It directs the Services to "[a]ctively seek the views of the action agency and its designated representatives, and involve them in your opinion preparation[.]" Handbook at 1-2. It also suggests that the Services consider optional procedures, such as memoranda of agreement, to better coordinate with other federal agencies. Handbook at 2-14 and 15. Finally, consistent with the Part 402 regulations, the Handbook directs the Services to release draft documents to action agencies and applicants: "Providing action agencies or applicants an opportunity to discuss a developing biological opinion, preliminary opinion, or conference may result in productive discussions that may reduce or eliminate adverse effects." Handbook at 1-12.

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[38] The Services have also addressed the meaning in Section 7 of the duty to use the best scientific information available. See U.S. Fish & Wildlife Service and National Marine Fisheries Service, Section 7 Consultation Handbook (Mar. 1998) at 1-6 to 1-7, available on the FWS web site, www.fws.gov, and using the "search" window to type in the term "section 7 consultation handbook" and clicking on the following search result link: http://endangered.fws.gov/consultations/s7hndbk/s7hndbk.htm.

3. NMFS Consultation Practice with Respect to Fisheries Actions.

a. Procedures for FMP Consultations.

The Handbook lists fishery-related actions warranting consultation as including FMPs, amendments to FMPs, research or incidental take permits issued under Section 10 of the ESA or the MMPA, and regulations issued under the ESA, MMPA, and MSA. Handbook, at 1-6. It states that the NMFS regional offices are responsible for conducting consultation for activities occurring within their region, with a lead region being designated in cases where an activity or a species occurs in two or more regions. Handbook at 1-4. It also notes that the Endangered Species Division of the Office of Protected Resources at NMFS Headquarters conducts "programmatic consultations and those with a national scope."[39] Review and final clearance of formal biological opinions other than those prepared for anadromous species in the Southwest and Northwest Regions rest with the Endangered Species Division, although this policy seems to be changing under the Regulatory Streamlining Project announced by NOAA's Assistant Administrator for Fisheries, Dr. William Hogarth in 2001.

While the Handbook does not provide details on the process for consultations on FMPs and amendments, NMFS' Guidelines do.[40] This process contemplates that NMFS will function as the action agency, with the councils playing a significant role in the assessment of the fishery's potential impacts. According to the Guidelines, NMFS (or FWS if applicable) is to provide a list of endangered or threatened species, critical habitats, and species proposed for listing to the councils so that they can assess whether fisheries, as they are managed under the council's FMPs, may affect any of these species or habitats.

The Guidelines divide the FMP process into five phases and describe the impacts of the ESA on each: planning, preparation of draft documents, public review and council adoption, final FMP/amendment review and approval, proposed regulations and final rulemaking, and continuing and contingency fishery management.

The Guidelines view the process as a collaboration between NMFS and the council, with the council apparently taking the lead in compiling the necessary information on which to make the determinations for a biological assessment.[41]

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[39] Id. The Handbook defines programmatic consultations as consultations addressing "an agency's multiple actions on a program, regional or other basis." Handbook at xvii. "[E]cosystem" is also included as a basis at 5-5.

[40] See supra, note 3.

[41] The Guidelines state:

> In the FMP/amendment and related documents, the Councils, in coordination with NMFS, must assess the potential impacts of the action. . . . However, NMFS is the Federal agency with which consultation must occur. Fishing conducted under the FMP/amendment must be considered for its effects, rather than just the effects of specific management measures (Memorandum, William W. Fox, Jr., Oct. 18, 1990). Councils may contact staff in NMFS Regions and Centers for information on possible effects of proposed FMP/amendments. Any

> NMFS should assist in assessing the impacts (if any) on protected species and critical habitat. Councils will include an impact assessment in draft FMPs and amendments or in the EA/EIS, that may serve as the biological assessment for consultation. If NMFS determines, based on [the council's] impact assessment or other documentation, that the fishery may affect listed species or critical habitat, NMFS (or FWS) will determine whether formal consultation under the ESA is necessary.

Id. at A-10-11 (citation omitted). The councils are encouraged to include measures to minimize adverse impacts in the FMPs or amendments.

In the planning phase, the councils are asked to consider and make a preliminary assessment of possible effects on listed species and habitat (including proposed listings and designations) as part of the NEPA scoping process. This presumably entails beginning to compile the information necessary to prepare a biological assessment for Section 7 purposes. In preparing the draft FMP and NEPA documents, the councils are asked to include in the environmental assessment (EA) or draft EIS, an analysis of possible effects on listed species or habitats, and to state a conclusion for the preferred and other alternatives whether or not the alternative would be likely to adversely affect such species or habitat. Id. at A-18.

In the third phase of the FMP process, the documents are reviewed by the regional and headquarters offices. This is the point at which the regional office's sustainable fisheries office and various headquarters offices decide whether a formal Section 7 consultation is needed; if so, a consultation between the regional offices of sustainable fisheries and of protected resources is undertaken. This appears to be the end of the active involvement of the councils in the biological opinion process, as contemplated in the Guidelines. The Guidelines state that the appropriate regional administrator will advise the council of actions that should or must be taken to comply with the biological opinion. Id. at A-56. The Guidelines require the councils, as they proceed with adopting the FMP or amendment (phase IV), to include in their documents the regional office's ESA determinations, including any measures identified in the biological opinion and incidental take statement.

Only after the biological opinion determinations and measures are incorporated into council FMP/amendment is the FMP/amendment submitted to the regional administrator for review and the MSA review period begun. In the final phase, the public comment period is started on the FMP/amendments and proposed rules, and a decision meeting is held to resolve "approvability issues" including under ESA. Id. at A-18 to A-19. Presumably, if the final council document contains species-protective measures other than those developed by the regional office in the biological opinion, this will constitute an approvability issue.

> required consultation with NMFS should be completed during Phase III [Public Review and Council Adoption], but must be completed prior to submission of the FMP/amendment for Secretarial review (Phase IV).

Guidelines at A-54.

The Guidelines do not describe in any detail the process by which the regional Office of Protected Resources conducts the formal consultation and develops the biological opinion. They do state, however, that the resulting biological opinion will be issued to NMFS as the action agency[,]" and the

> [c]ouncils may be invited to participate in the compilation, review, and analysis of data used in the consultation. The impact analysis presented in the Council's FMP or amendment, or its EA/EIS, will provide a basis for assessing the impacts" on the listed species and critical habitat.

Id. at A-55. The Guidelines reiterate that the determination of "whether the action (i.e., the fishery) 'is likely to jeopardize the continued existence of'" listed species or their "habitat is the responsibility of NMFS[.]" Id. at A-55. This is in accord with a March 7, 2001 memorandum from the Acting Assistant Administrator for Fisheries to the regional councils on their role in the ESA consultation process, and with the opinion of the NOAA Office of General Counsel to Clarence Pautzke of Feb. 23, 2001, both of which are described in the Discussion section of this memorandum.

As a result of conflict over biological opinions on fishery management actions and the reasonable and prudent alternatives, described in more detail in the next section, NMFS announced in 2001 that its Office of Sustainable Fisheries would release three official draft biological opinions prior to their final signature, would analyze the effect of those releases, and would consider enhancing the councils' involvement in the ESA process as part of an overall review of the FMP/ESA/NEPA process. These released opinions were for the 2001 Atlantic Pelagic Fishery, the 2001 Pacific Pelagic Fishery, and the 2001/2002 Alaska Groundfish Fishery. Hogarth Memorandum at 2-3 (Mar. 7, 2001).

b. Litigation History of FMP Biological Opinions.

Since 1999, courts have had occasion to review several FMP-related biological opinions in a spate of litigation under the MSA, ESA, and NEPA. With one exception, all of the court opinions have concerned the scope and adequacy of the biological opinions and their jeopardy/adverse modification determinations, with only indirect comment upon the procedures followed in the consultation process.[42] The one case in which the consultation procedures were

[42] The Supreme Court held in Bennett v. Spear, 520 U.S. 154 (1997), that biological opinions are final agency actions subject to judicial review upon issuance. It also held that private users of a public resource managed by the federal action agency have standing to challenge the biological opinion on that federal action. The principal FMP biological opinion cases are the three opinions by Judge Zilly in Greenpeace v. National Marine Fisheries Serv., at 55 F.Supp.2d 1248 (W.D.Wash. 1999) (biological opinion contained sufficient scientific support for the jeopardy determination for the pollock fisheries and the no jeopardy determination for the mackerel fishery but insufficient analysis to support the reasonable and prudent alternatives chosen to avoid the jeopardy and adverse modification); at 80 F.Supp.2d 1137 (W.D.Wash. 2000) (NMFS was required to prepare a comprehensive biological opinion coextensive in scope with the North Pacific groundfish FMPs including a cumulative effects analysis); and at 106 F.Supp.2d 1066 (W.D.Wash. 2000) (enjoining all groundfish trawl fisheries within Steller sea lion critical habitat west of 144 degrees W. longitude until NMFS prepared a comprehensive biological opinion on the full scope of the North Pacific groundfish FMPs), and Greenpeace Found. v. Mineta, 122 F.Supp.2d 1123 (D.Haw. 2000)

the focus of the decision is Hawaii Longline Ass'n. v. National Marine Fisheries Serv., No. 01-765, 2002 U.S. Dist. LEXIS 7263 (D.D.C. Apr. 25, 2002), stemming from the conflict over the Hawaii-based pelagic longline fishery and its impact upon sea turtles.[43]

In May 2000, NMFS reinitiated consultation for the FMP for the Pelagic Fisheries of the Western Pacific Region after a federal court enjoined the pelagic longline fishery was enjoined by a federal court due to higher than expected incidental take rates of listed sea turtles. NMFS released the new biological opinion on March 29, 2001, to provide the enjoining court with a basis for lifting the injunction. The 2001 opinion concluded that the fishing activity under the FMP was likely to jeopardize three of the four sea turtle species, based upon a new analysis of incidental take estimates from observer data. To carry out the reasonable and prudent alternatives in the opinion, NMFS published strict regulations effectively closing the swordfish fishery and restricting the tuna fishery. The Hawaii Longline Association asked to review the biological opinion while it was still in draft form. When NMFS declined to release the draft biological opinion, the Hawaii Longline Association sued the agency, claiming it had violated the requirements of Section 7. In April, 2002, U.S. Magistrate John Facciola issued a recommended decision, concluding that under the reasonable interpretation of the Part 402 regulations, the fishing association was an applicant and entitled to review the draft biological opinion. Although the regional council's request for a copy of the draft opinion had also been turned down, Magistrate Facciola pointed out that the council was not a party to the suit and therefore its right of access to the draft opinion was not an issue in the case. The government filed objections to the magistrate's recommendation, and the matter is still pending before the district judge.

4. New Approaches.

Since the 1980s, NMFS has relied on the Section 7 consultation process as the means to address interactions between specific fisheries and protected species and to develop regulatory measures to reduce or eliminate any impacts. Recently, NMFS has begun to integrate several of its legal authorities, especially NEPA, the ESA, and the MSA, to develop more comprehensive approaches to species protection. For example, in June, 2001, NMFS approved a Strategy for Sea Turtle Conservation & Recovery in Relation to Atlantic Ocean and Gulf of Mexico Fisheries. The strategy was developed by its Office of Protected Resources and aimed at

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(permanently enjoining fishing under the Western Pacific crustacean fisheries FMP pending compliance with ESA and NEPA requirements).

[43] When plaintiff environmental groups challenged the basis for the 'no jeopardy' finding of NMFS' 1998 biological opinion on the Western Pacific pelagics FMP and the agency's failure to prepare an EIS, federal district court Judge David Ezra dismissed all the ESA claims but partially enjoined operation of the longline fishery pending completion of the EIS. Leatherback Sea Turtle v. NMFS, No. 99-00152 (D.Haw. Oct. 18, 1999). The court ordered NMFS to impose gear changes and later closed large areas of the North Pacific to pelagic longlining by vessels owned by members of the Hawaii Longline Association. NMFS reinitiated consultation on the FMP after the incidental take rates exceeded those projected in the 1998 opinion. In a later order (June 23, 2000), Judge Ezra set an April 1, 2001 deadline for the final EIS. The draft EIS was published in December 2000 and the draft biological opinion was posted on the agency's website on March 12, 2001. Both the HLA and the Western Pacific Fishery Management Council requested applicant status and an opportunity to review the draft 2001 opinion and its RPA. NMFS denied both requests but posted the draft opinion on its website for a few days before it issued the final opinion and EIS and delivered both to Judge Ezra by the April 1, 2001 deadline.

addressing sea turtle bycatch on a gear basis throughout the Atlantic and Gulf of Mexico rather than a fishery-by-fishery basis. The June 1, 2001 Decision Memorandum notes that the current practice of addressing fishery interactions through the Section 7 consultation process on federal fisheries is less than optimal as a comprehensive strategy. It does not allow "integration of state-managed fisheries and fisheries not currently managed under an FMP." NMFS plans to implement the new strategy through the NEPA scoping process and an EIS on each gear of concern. This process is designed to reach agreement on actions to reach species recovery goals defined in updated recovery plans, after the preparation of improved stock assessments and estimations of bycatch rates and their significance. Implementation of the agreed-upon measures will be through ESA and Magnuson-Stevens Act regulations. See Notice of Intent to Prepare an EIS; Request for Written Comments [on comprehensive sea turtle strategy and scoping process], 66 Fed. Reg. 39,474 (July 31, 2001).

By using the NEPA scoping process and the development of a draft EIS on alternative approaches to reducing incidental takes in specific gear categories, NMFS may avoid some of the procedural conflicts that have arisen in the Section 7 consultation process, especially relating to the process by which regulatory measures are developed. Under the process laid out in the FMP Operational Guidelines, the biological opinion appears to come relatively late in the process of developing FMP amendments or regulations. Given the commitment of time and resources committed to developing FMP measures made by the councils, their committees, and advisory panels, this can put considerable strain on the process.

It would be consistent with the policies underlying the Part 402 regulations and the Consultation Handbook for a consulting Service to supplement the Handbook and regulations with specific guidance to an action agency on how it will interpret and apply the no jeopardy and adverse modification criteria of Section 7 to categories or types of resource management actions the action agency may propose in the future. The FWS took this approach in 2001. As part of the settlement of a lawsuit regarding protection of the Florida manatee, the FWS prepared and gave notice of a guidance document on how it will apply Section 7 to docks and other boat access facilities that bring vessels into waters inhabited by the manatee.[44] The document gives guidance to agencies and individuals on measures that could be incorporated into the design of boat access facilities such that incidental takes can be avoided. The guidance is interim while incidental take regulations are being promulgated under the MMPA. While the object is to reduce incidental takes, a similar kind of guidance could inform regional councils on actions that could be taken to reduce the likelihood of jeopardy or adverse modification by a fishery. If NMFS were to promulgate a similar guidance document for fishery management actions, it would give the councils much earlier notice of NMFS' potential application of the no jeopardy/ adverse modification criteria of Section 7(a)(2) and of the alternative measures that it considers reasonable and prudent for fishery-protected species interactions of a certain kind.

[44] See FWS, Notice of Availability of Interim Strategy on Section 7 Consultations Under the ESA for Watercraft Access Projects in Florida that May Indirectly Affect the West Indian Manatee, 66 Fed. Reg. 14,924 (Mar. 14, 2001); Save the Manatee v. Ballard, No. 1:00CV00076 (D.D.C. Jan. 13, 2000) (Settlement Agreement approved by Order issued Jan. 5, 2001).

III. The National Environmental Policy Act.

A. Background and Purpose.

The National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., is the basic national charter for protection of the environment. It purposes are to "encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation." 42 U.S.C. § 4321.

The Supreme Court has held that NEPA's mandate to agencies is "essentially procedural. . . . It is to insure a fully informed and well-considered decision[.]" Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 558 (1978) (citations omitted), rev'd on other grounds sub nom. Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87 (1983). NEPA has the twin aims of requiring agencies to consider every significant aspect of the environmental impact of a proposed action, and to inform the public that it has indeed considered environmental concerns. Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 97, 100-101 (1983). NEPA does not require, however, that agencies elevate environmental concerns over all other appropriate considerations. Rather, NEPA requires that an "agency take a 'hard look' at the environmental consequences" as part of the process of deciding whether to take a major action. Id. at 97. (Citation omitted.) "[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) (citations omitted). "Other statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed -- rather than unwise -- agency action." Id. at 351.

B. NEPA Procedural Requirements.

NEPA is applied through the "action forcing" provisions of Section 102. Section 102 requires that all federal agencies prepare a detailed Environmental Impact Statement (EIS) for "major Federal actions significantly affecting the quality of the human environment . . . ." The EIS must address:

> (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C)(i)-(v). NEPA established the Council on Environment (CEQ), which adopted regulations to implement Section 102(2). See 40 CFR § 1500-1508.

A programmatic EIS (PEIS) is required for connected actions, meaning actions that are closely related. A PEIS is also required for cumulative actions, actions which when viewed with other proposed actions have cumulatively significant impacts. A PEIS may also be prepared for similar actions, actions that have a common basis for evaluation, such as timing or geography. 40 CFR § 1508.25(a).

A supplemental EIS (SEIS) is required for on-going actions when either (1) the agency makes substantial changes in the on-going action that are relevant to environmental concerns or (2) there are significant new circumstances or information relevant to environmental concerns involving the on-going action. 40 CFR § 1502.9(c).

In determining whether an action is "major" and will have a "significant" effect on the environment, an agency may prepare an Environmental Assessment (EA). An EA is a concise public document that serves to: (1) briefly provides sufficient evidence and analysis for determining whether to prepare an EIS; (2) aid an agency's compliance with NEPA when no EIS is necessary; and (3) facilitate preparation of an EIS when one is necessary. The EA must include a brief discussion of the need for the proposed action, the alternatives to the proposed action, the environmental impact of the proposed action and alternatives, and a listing of agencies and persons consulted. 40 CFR § 1508.9. If the agency determines after preparing an EA that an action will not have a significant effect on the environment, then a "finding of no significant impact" (FONSI) is made and the NEPA review process concludes.

An agency may determine that certain actions do not individually or cumulatively have a significant effect on the human environment, and therefore do not require an EIS or EA. Such actions may be granted a "categorical exclusion" (CE).

A "lead agency" is designated to supervise the preparation of an EIS if more than one Federal agency either proposes or is involved in the same action, or is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity. Potential lead agencies are supposed to agree which shall be the lead agency and which shall be "cooperating agencies" by letter or memorandum. If they cannot agree, there is a procedure for submitting the dispute to the CEQ for resolution. See 40 CFR § 1501.5.

A "cooperating agency" is any other Federal agency other than the lead agency, which has jurisdiction by law or special expertise with respect to an action that is subject to an EIS. 40 CFR § 1508.5. "Jurisdiction by law" means authority to approve, veto or finance all or part of the proposal. 40 CFR § 1508.15. "Special expertise" means "statutory responsibility, agency mission, or related program experience. 40 CFR § 1508.26. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition, any other Federal agency which has special expertise may request cooperating agency status. 40 CFR § 1501.6.

As soon as practicable after a decision is made to prepare an EIS, the lead agency is required to begin a process known as scoping by publishing a Notice of Intent (NOI) in the Federal Register. Scoping is intended to be an early and open process for identifying the significant issues related to the proposed project. As part of the scoping process the lead agency is required to invite the participation of affected Federal, state, local or tribal entities and other

interested persons, determine the scope of issues to be analyzed in the EIS, and allocate assignments among lead and cooperating agencies, among other things. The lead agency may set page or time limits for the EIS, and hold scoping meeting. 40 CFR § 1501.7.

The CEQ regulations do not set deadlines for the NEPA process, but encourage Federal agencies to set time limits appropriate to the individual action. 40 CFR § 1501.8. The EIS is supposed to be prepared early enough so that it can be used as an important part of the decision making process, not just to rationalize or justify decisions already made. 40 CFR § 1502.5.

The EIS is generally prepared in two stages. First, a draft environmental impact statement (DEIS) is prepared and made available for comment. Comments are solicited from cooperating agencies, state, local and tribal entities, any applicants, and the public at large. In response to the comments, the lead agency may modify alternatives, consider new alternatives, supplement, improve or modify its analyses, and make corrections. The agency may also explain why the comments do not warrant further response. All of the comments, the agency's responses and any changes or modifications are consolidated into the final EIS. 40 CFR § 1502.9.

The final EIS, together with comments and responses, are filed with the EPA in Washington, D.C. In general, no decision on the proposed action may be made until 30 days after EPA publishes a Notice of Availability (NOA) of the final EIS in the Federal Register. 40 CFR § 1506.9 and 10. Once this 30-day "cooling off" period runs, the agency prepares a Record of Decision (ROD), a concise public record stating what the decision was, identifying alternatives considered and stating whether means of avoiding or minimizing harm from the alternative selected have been adopted. 40 CFR § 1505.2.

In general, until an agency issues a ROD, no action concerning the proposal shall be taken which would have an adverse environmental impact, or limit the choice of reasonable alternatives. 40 CFR § 1506.1.

Certain principles are intended to apply throughout the NEPA process. In the interest of reducing paperwork and delay, the CEQ regulations direct agencies to integrate NEPA with other planning and review procedures, so that procedures run concurrently, not consecutively. 40 CFR §§ 1500.2(c), 1500.4(k), 1502.25. NEPA documents are to be combined with other documents to the extent possible. 40 CFR § 1500.4(o), 1506.4. Early planning, interagency cooperation and diligent efforts to involve the public are all emphasized. 40 CFR §§ 1500.5(a) and (b), 1501.2, 1501.6, 1506.6.

C. Conflicts Between NEPA and Other Statutes.

Section 102 provides that, to the fullest extent possible, the policies, regulation and laws of the United States are to be interpreted and administered in accordance with NEPA. The CEQ regulations interpret the phrase "to the fullest extent possible" to mean that each agency of the Federal government shall comply with NEPA "unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible." 40 CFR § 1500.6. Notwithstanding this mandate, the courts have found that agencies may be exempted from the requirements of NEPA in certain circumstances. These NEPA exemptions are summarized below.

One instance in which NEPA does not apply is where there is an "irreconcilable conflict" between NEPA and another statute. The leading case on the irreconcilable conflict theory is Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976), reh'g denied, 429 U.S. 875 (1976). The issue in that case was whether it is necessary for the Department of Housing and Urban Development (HUD) to prepare an EIS when performing its duties under the Interstate Land Sales Disclosures Act. That act required HUD to allow a disclosure statement filed by a real estate developer to become effective within 30 days of filing, unless incomplete or inaccurate. The Supreme Court recognized that HUD could not prepare an EIS within the 30-day period, and concluded that where a "clear and unavoidable conflict in statutory authority exists, NEPA must give way." 426 U.S. at 788. See also Westlands Water Dist. v. Natural Res. Def. Council, 43 F.3d 457, 460 (9th Cir. 1994), aff'd sub nom. O'Neill v. United States, 50 F.3d 677 (9th Cir. 1995), cert. denied, 516 U.S. 1028 (1995) (an irreconcilable conflict exists if a statute mandates a fixed time period for implementation which is too short to allow for compliance with NEPA. If, however, the statute does not require implementation within any particular period, NEPA will be applicable).

Another recognized category of exemption applies where an agency's decision-making process duplicates or provides the "functional equivalence" of NEPA's procedural requirements. For example, in Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), cert. denied sub nom. Portland Cement Corp. v. Administrator, Envtl. Prot. Agency, 417 U.S. 921 (1974), aff'd sub nom. Portland Cement Ass'n v. Train, 13 F.2d 506 (D.C. Cir. 1975), cert. denied, 423 U.S. 1025 (1975), reh'g denied, 423 U.S. 1092 (1976) the court considered whether the EPA was required to prepare an EIS before adopting air quality standards under Section 111 of the Clean Air Act. The D.C. Circuit found that the Clean Air Act already required the EPA to consider the environmental effects of its action, both pro and con, and provided an opportunity for public notice and comment. Even though the EPA's rule-making process would not provide all of the analysis of an EIS, the court concluded that the process struck a workable balance that would meet the purposes of NEPA. The court also recognized that requiring an impact statement would present the danger that opponents of environmental protection would use the issue of NEPA compliance as a tactic of litigation and delay. 486 F.2d at 383-387.[45]

Following Portland Cement, courts have granted functional equivalence exemptions for EPA actions under a variety of statutes. See, e.g., Environmental Defense Fund v. EPA, 489 F.2d 1247, 1256 (D. D.C. 1973) (registration of pesticides under Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) exempt from NEPA); Alabama ex rel. Siegelman v. United States Envtl. Prot. Agency, 911 F.2d 499 (11th Cir. 1990) (exempting the issuance of Resource Conservation and Recovery Act hazardous waste management facility permits from NEPA). However, the exemption has not been widely applied in cases involving other agencies. For example, in Texas Comm. on Natural Res. v. Bergland, 573 F.2d 201, 208 (5th Cir. 1978), reh'g denied, 576 F.2d 931 (5th Cir. 1978), cert. denied, 439 U.S. 966 (1978), the Fifth Circuit rejected a Forest Service claim that procedures followed in developing a timber harvest plan are the functional equivalence of NEPA. The Fifth Circuit noted that the Forest Service is not an agency

[45] Congress subsequently amended the Clean Air Act to include the Portland Cement exemption: "No action taken under the Clean Air Act shall be deemed a major federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 . . . ." 15 U.S.C. § 793(c)(1).

whose sole responsibility is to protect the environment, but rather must balance environmental and economic needs in managing the nation's timber supply. 573 F.2d at 208.

Another NEPA exemption recognized by the Ninth Circuit is characterized as the "displacement" theory. In Merrell v. Thomas, 807 F.2d 776 (9th Cir. 1986), cert. denied, 484 U.S. 848 (1987) it was held that the EPA was not required to prepare an EIS before registering herbicides under FIFRA. The decision was based on two grounds. First, FIFRA requires EPA to act as expeditiously as possible, and this time frame is incompatible with the lengthy process normally required for an EIS. Second, based on legislative history, the court found that Congress did not intend for NEPA to apply to FIFRA. EPA had not applied NEPA to FIFRA actions prior to a series of legislative amendments, and in making those amendments Congress gave no indication that it thought NEPA would apply. Congress's failure to revise the EPA's longstanding administrative interpretation was taken by the court as evidence that the EPA's interpretation is the one intended by Congress. 807 F.2d at 778.

The Merrell decision was followed in Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 516 U.S. 1042 (1996), reh'g denied, 516 U.S. 1185 (1996), in which it was held that NEPA does not apply to designation of critical habitat under the ESA. The Ninth Circuit found that ESA procedures have displaced NEPA requirements. The Ninth Circuit also found, in the alternative, that NEPA does not require an EIS for actions that preserve the physical environment, and that the ESA furthers the goals of NEPA without requiring an EIS. The court was reluctant to make NEPA more of an obstructionist tactic to prevent environment protection than it may have already become. Douglas County, 48 F.3d at 1508, citing Pacific Legal Found. v. Andrus, 657 F.2d 829 (6th Cir. 1981) (holding that listing decisions under the ESA are exempt from NEPA).[46]

A further NEPA exemption is recognized for actions that occur outside of the territory of the United States. Absent a plain statement of extraterritorial effect, U.S. statutes generally do not apply abroad. Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 109 (1991). A number of judicial decisions have declined to apply NEPA to actions occurring outside of U.S. territory, particularly where foreign policy or national security issues are implicated. See, e.g., Greenpeace U.S.A. v. Stone, 748 F. Supp. 749 (D.Haw. 1990), appeal dismissed, 924 F.2d 175 (9th Cir. 1991) (NEPA not applicable to shipment of munitions within Germany or from Germany to Johnston Atoll); NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466 (D.D.C. 1993) (NEPA not applicable to U.S. military bases in Japan). One court, however, found NEPA applicable to actions planned in the U.S., and carried out in Antarctica. Environmental Defense Fund v. Massey, 986 F.2d 528 (D.C. Cir. 1993).

A case that is currently pending presents the question of whether NEPA applies in the Exclusive Economic Zone (EEZ). In Natural Res. Def. Council v. United States Dep't of the Navy, No. CV-01-07781 (C.D.Cal.), an action involving U.S. Navy anti-submarine warfare technologies, the government asserts that NEPA does not apply to sea tests with impacts exclusively outside U.S. territory, nor to tests with impacts exclusively in the U.S. EEZ. District

[46] The Tenth Circuit rejected the reasoning of Douglas County, and held that NEPA does apply to designation of critical habitat under the ESA. Catron County Comm'rs v. United States Fish & Wildlife, 75 F.3d 1429 (10th Cir. 1996).

Court Judge Christina Snyder has denied the government's motion for summary judgment and confirmed that NEPA applies in the EEZ (order on cross motions for summary judgment at 21-22, Sept. 17, 2002).

D. NMFS Policies and Procedures in Implementing NEPA.

1. NAO 216-6.

The CEQ regulations direct other Federal agencies to adopt their own procedures to implement NEPA. See 40 § CFR 1507.3. NMFS has done so in NOAA Administrative Order 216-6 (NAO 216-6). The main provisions of NAO 216-6 are summarized below.

Section 1 explains the purposes of NAO 216-6, which are establishing policies, requirements and procedures for complying with NEPA. One subject identified as warranting special emphasis is NOAA's policy on the scope of NEPA analysis, which is to consider the impacts of actions on the marine environment both within and beyond the U.S. Exclusive Economic Zone (EEZ). NAO 216-6, §§ 1.02.b.1, 3.02 and 7.01.

Section 2 of NAO 216-6 establishes a chain of command for implementation of NEPA. At the top is the NEPA Coordinator, within NOAA's Office of Policy and Strategic Planning. For each action potentially subject to NEPA, a Responsible Program Manager (RPM) is designated to carry out the NEPA process. The RPM determines whether actions are subject to the NEPA process or excluded, and the appropriate type of NEPA review needed. NOA 216-6, § 2.02.c. When a proposed action involves several organizational units in NOAA, the RPMs of each unit are to jointly determine which RPM should take the lead in the NEPA review. Where disagreements arise, the NEPA Coordinator makes the final decision. NOA 216-6, §§ 5.01.b.6 and 7.

Section 3 states NOAA's policies in meeting the requirements of NEPA. These include fully integrating NEPA into the planning and decision-making process, fully considering environmental impacts, and early involvement of interested and affected agencies, governments, organizations and individuals.

Section 4 sets out definitions. A provision indicates that councils are not "applicants" because of "their unique status under Federal law", but does not explain the significance of this unique status under NEPA. NAO 216-6, § 4.01.b.

Section 5 sets out the implementing procedures for the NEPA review process. It includes general requirements for EISs, EAs and CEs and guidance on streamlining the NEPA process. It calls for NEPA procedures to run concurrently with other public review and comments periods and stresses the importance of cooperative document preparation. Public involvement is recognized as essential in implementing NEPA, and RPMs are directed to make every effort to encourage the participation of Federal, state and local agencies, affected Indian tribes, and other interested persons throughout the process. NAO 216-6, §§ 5.01.b.2, 6 and 7, 5.01.02.b.1 and 2.

Section 6 provides specific guidance on integration of NEPA into NOAA programs. It includes factors to consider in determining whether a fishery management action is "significant", including whether it may jeopardize the sustainability of any target or non-target species, damage

Essential Fish Habitat, or adversely affect endangered or threatened species. It also lists specific fisheries actions requiring EAs and EISs, and those that may receive a CE. NAO 216-6, §§ 6.02, 6.03.d.

Section 6.03.d addresses NEPA documents for actions taken under the Magnuson-Stevens Act. It provides that, to the extent possible, documents developed to support FMPs, FMP amendments, and other actions should be integrated with the NEPA document to produce one combined document. NMFS and the councils are encouraged to attempt to develop and integrate the NEPA document with the FMP public hearing documents at the earliest possible stage. Section 6.03.d acknowledges that the NEPA analysis and the analysis required under the Magnuson-Stevens Act may be similar, but states: "the scope of the NEPA analysis must include a discussion of the broader impacts of the fishery as a whole on the human environment."

Section 7 deals with integrating NEPA with other orders, including Executive Order 12114, Environmental Effects Abroad of Major Federal Actions (E.O. 12114). For purposes of E.O. 12114, the phrase "outside the United States" is interpreted to mean the area beyond the 200-mile EEZ and continental shelf of the United States. NAO 216-6, § 7.01.a.4.

In general, NAO 216-6 provides little guidance on the role of the regional fishery management councils in implementing NEPA. The councils are not mentioned as being part of the chain of command under Section 2. Provisions on scoping and public involvement indicate that RPMs should encourage the councils to include the NEPA document with the council's public hearing documents, but do not explain which entity is responsible for the preparation of those documents. NAO 216-6, § 5.02.b.1. The councils are also mentioned in passing in a provision directing, to the maximum extent possible, comprehensive public involvement and interagency consultation to ensure early identification of issues. NAO 216-6, § 5.02.c.2. Again, there is no explanation of the process for consultation with the council. Section 6.03.d.1 and 2 imply the councils should have a role in determining whether to prepare an EA or EIS. For example: "An EIS must also be prepared for all FMP amendments and regulatory actions when the [councils] or NMFS determines that significant beneficial or adverse impacts are reasonably expected to occur." NAO 216-6 § 6.03.d.2 (emphasis added). However, there is no explanation of how the council becomes involved in the decision making process, or what happens if the council and NMFS disagree.

2. 1997 Operational Guidelines for the Fishery Management Process.

Further guidance on the NEPA process, and its interrelation with the MSA and ESA are found in NMFS' 1997 FMP Operational Guidelines. According to the Operational Guidelines, the NEPA and MSA requirements for schedule, format and public participation are compatible and enable one activity or document to fulfill both obligations. Operational Guidelines at A-11.

The Operational Guidelines make it clear the councils have a significant role in the NEPA process. In Phase I, the planning stage, the Council initiates the scoping process, and decides whether an EA or EIS should be prepared. The Council begins preparation of the

appropriate environmental document in consultation with the NMFS Regional Administrator. Operational Guidelines at A-15, 20-21.

In Phase II, the document preparation stage, the council prepares the draft environmental document, and submits it to NMFS for informal agency review. Operational Guidelines at A-15. Except for ESA consultations and biological opinions, the council has the primary responsibility for preparation of these documents, with assistance from NMFS, as requested and available. Operational Guidelines at A-22.

In Phase III, the public review and council adoption phase, the council conducts public hearings, and identifies the preferred alternative for purposes of an EA or EIS. NMFS participates under NEPA as requested by the council. Operational Guidelines at A-16, 58. After public review, the primary responsibility for ensuring NEPA compliance shifts to NMFS. NMFS review the draft EA or EIS for CEQ and NAO 216-6 compliance. If a DEIS is acceptable, NMFS prepares it for filing with EPA and arranges for publication of a Notice of Availability (NOA). If NMFS finds the DEIS unacceptable, it is returned to the Council with suggested modifications. After the NOA is published by EPA, NMFS reviews the DEIS for substantive issues, and prepares an issues letter to the council. Operational Guidelines at A-58-59. The council considers the NMFS letter and the public comments and incorporates them into the final EIS. Operational Guidelines at A-16, 60.

In Phase IV, the final FMP or amendment is submitted to the Secretary for approval. NMFS staff considers public comments and makes the final determination of NEPA compliance as part of the process of approving, disapproving or partially approving the FMP or amendment. Operational Guidelines at A-16, 60-62.

3. Regulatory Streamlining Project.

In response to concerns over increasing legal challenges to fishery management actions, NMFS is undertaking a Regulatory Streamlining Project (RSP) to improve the efficiency and effectiveness of regulatory operations and decrease vulnerability to litigation. The RSP initiative highlights the application of NEPA as a critical component of the regulatory process. NEPA is regarding as providing the analytical framework for addressing the requirements of other statutes and ensuring environmental compliance. Among other things, the RSP calls for "front-loading" the NEPA process through active participation of NMFS and Council staff at the early stages of fishery management action development, NEPA training for NMFS and Council staff, and hiring of additional staff dedicated to NEPA implementation. The RSP also calls for revision of the 1997 Operational Guidelines, and clarification of the responsibilities of Councils in NEPA compliance.

DISCUSSION

ISSUE 1: To date, the role of the councils in implementation of the ESA has been unclear, particularly as to the formulation of biological opinions and incidental take statements. Much of the confusion centers on what constitutes the agency action for purposes of Section 7. As discussed below, NMFS has construed "federal action" broadly for NEPA purposes to include

the council process. In contrast, NMFS has construed the "federal action" for ESA purposes narrowly, to include only the Secretary's review of the councils' recommended actions. If the action includes the management planning process, the implementation of the selected management measures and the operation of the fishery under the approved regulations, then at least two questions arise: (1) when in this ongoing process is consultation required?; and (2) what is the role of the councils in the consultation process which takes place between the Office of Sustainable Fisheries and the Office of Protected Species in NMFS? For the reasons stated below, we conclude that the council planning process is part of the federal action and the councils are part of the "action agency" for purposes of Section 7 of the ESA.

The ESA defines "Federal agency" broadly, as "any department, agency, or instrumentality of the United States." 16 U.S.C. § 1532(7). The term, however, is not further defined in the Part 402 regulations. The regulations, however, do define "action" for Section 7 purposes as "all activities or programs of any kind authorized, funded or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02.

Courts reviewing application of Section 7 to federal resource management decisions have held that "agency action" is to be construed broadly.[47] The court reviewing biological opinions on the Alaska groundfish FMPs, for example, held that the agency action includes "'all of the rules, regulations, conditions, methods, and other measures' required to maintain the fisheries and prevent long-term adverse effects on fishery resources and the marine environment." Greenpeace v. National Marine Fisheries Serv., 80 F.Supp.2d at 1144-45 (quoting from the definition of FMP in the Magnuson-Stevens Act, 16 U.S.C. § 1802(5)).

NMFS, however, has adopted a much narrower interpretation of the action for purposes of Section 7 consultations. On March 7, 2001, Dr. William Hogarth, then Acting Administrator for NOAA Fisheries, issued a memorandum entitled "Regional Fishery Management Council Role in the Endangered Species Act Consultation Process." The memorandum concluded that because NMFS has final approval authority for FMPs and amendments, the councils "do not fit the definition of a Federal action agency or applicant within the ESA context" and referring to an attached legal memorandum prepared by the Office of General Counsel.[48] Based on this interpretation, Dr. Hogarth's memorandum concludes that it is the NMFS' policy not to release

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[47] See Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1055 (9th Cir. 1994); Thomas v. Peterson, 753 F.2d 754 (9th Cir. 1985). In Greenpeace v. National Marine Fisheries Serv., 80 F.Supp.2d 1137, 1144-1145 (W.D.Wash. 2000), the court held that the FMPs for groundfish fisheries in the Bering Sea and Gulf of Alaska, in their entirety, constitute ongoing agency action subject to Section 7 consultations. This required that NMFS prepare a "comprehensive biological opinion" coextensive in scope with the FMPs and not limited to the effect of a single year of the fishery. Id. at 1145.

[48] Roger Eckert, Attorney-Advisor, GCF, Memorandum to Clarence Pautzke, Acting Deputy Assistant Administrator, Regional Fishery Management Councils as Federal Agencies or Applicants under the Endangered Species Act (ESA), Feb. 23, 2001.

draft biological opinions other than to the action agency and to share that information with the applicant.

The February 23, 2001, legal memorandum upon which Dr. Hogarth's memorandum relies is brief, concluding that while the councils have an important role in the management of federal fisheries, they are not the federal action agency for purposes of Section 7. NMFS, not the councils, takes the action that is subject to the Section 7(a)(2) requirement, that is, the approval of FMPs and the promulgation of implementing regulations. Neither are the councils permit applicants, again because they are not conducting the fishery management action under the Magnuson-Stevens Act, and therefore their actions are not the subject of the consultation. The legal opinion was apparently prepared to explain why NMFS would not release a draft biological opinion to a fishing organization, the Hawaii Longline Association (HLA). Not satisfied with the explanation given, the HLA sued the agency, giving a federal magistrate judge an opportunity to review the agency's interpretation of the terms "applicant" and "action" for Section 7 purposes. Hawaii Longline Ass'n. v. National Marine Fisheries Serv., No. 01-765, 2002 U.S. Dist. LEXIS 7263 (D.D.C. Apr. 25, 2002). For more discussion of this litigation, see II.B.3 of this memorandum.

In his recommended decision, Federal Magistrate Judge Facciola considered the proper scope of the agency action under the Magnuson-Stevens Act for purposes of Section 7(a)(2). He rejected as unpersuasive the interpretation NMFS relied upon in the Hogarth memorandum that the action is final approval of the Fishery Management Plans or amendment, an action committed solely to the discretion of the Assistant Administrator for Fisheries. Magistrate Judge Facciola found that this narrow interpretation gave insufficient consideration to the role of the councils in the actual development of FMPs and amendments. NMFS' interpretation was also inconsistent with its own prior practice of describing the proposed action in previous fishery-related biological opinions as being the management of the fishery as well as the continued operation of the fishery under the Fishery Management Plans and its implementing regulations.[49] He recommended that the action be considered to include both the management and operation of the fishery. The matter is still pending.

Given the ESA's broad definitions of "federal agency" and of "action," supported by the courts' interpretations of the action in the context of the Magnuson Stevens Act, we conclude that the regional fishery management councils are action agencies for the purposes of Section 7 because they have the primary responsibility for developing Fishery Management Plans or amendments. This view is consistent with the prior OLC opinions discussed above, which recognize that the councils are an "integral part" of the Department of Commerce. It is also consistent with the intent and purposes of the ESA, which broadly provides that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and

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[49] Hawaii Longline Ass'n. v. National Marine Fisheries Serv., No. 01-765, 2002 U.S. Dist. LEXIS 7263 at *27 (D.D.C. Apr. 25, 2002), citing Greenpeace v. National Marine Fisheries Serv., 80 F.Supp.2d 1137, 1145(W.D.Wash. 2000) (the agency action for Section 7 consultation regarding an FMP includes all of the regulations and measures affecting the fishery) and 50 C.F.R. § 402.02. Magistrate Judge Facciola stated, "[H]aving the final word is not especially significant for the purpose of defining the agency action." 2002 U.S. Dist. LEXIS at *25-26. Note that he was commenting only on the scope of the agency action, not on whether the council should be considered the action agency. He expressly did not decide the latter question. Id. at *28-29.

shall utilize their authorities in furtherance of the purposes of this Act." 16 U.S.C. § 1531(c). It is also consistent with the provisions of the CEQ regulations and the provisions of the Consultation Handbook describing Section 7 as an open, collaborative process. Finally, it is consistent with the NMFS policy of interpreting the federal action for NEPA purposes as including the councils' work, and providing the councils with a significant role in the NEPA decision-making process. The councils were established under a federal statute and have extensive authority under the Magnuson-Stevens Act to manage and conserve fishery resources, consistent with other applicable law. To conclude that the councils are something other part of a federal agency with no role to play in implementing the ESA ignores the applicable legal framework and practical reality. The fact that NMFS has the final authority to approve or disapprove actions recommended by the councils does not change the fact that the councils generally prepare nearly all fishery management plans which are then implemented without significant change by NMFS.

This is not to say, however, that the role of the councils as part of the action agency is not limited by the framework of the Magnuson-Stevens Act. Accordingly, the council plays a role in the federal action under review pursuant to Section 7 with the Office of Sustainable Fisheries. As such it is entitled to review any draft biological opinion issued by the Office of Protected Species under the Part 402 ESA regulations and to exercise the other duties and obligations of an action agency under the ESA, together with the Office of Sustainable Fisheries. Finally, the NMFS director (and the Secretary) has the responsibility for any final decisions as to ensuring compliance with the requirements of the Magnuson-Stevens Act and the ESA.

ISSUE 2: The 1997 Guidelines prepared by NMFS appropriately describe the respective roles of the council and NMFS in meeting the requirements of NEPA. The Guidelines provide that the council has the primary responsibility for initiating the NEPA scoping process, deciding whether an environmental assessment or environmental impact statement should be prepared, developing and selecting the alternatives to a proposed action, preparing draft environmental documents, and soliciting public comments on the draft documents. Once the draft documents have been prepared and distributed for public review, then NMFS has the final responsibility for determining NEPA compliance as part of the process of approving, disapproving or partially approving the council's actions. Operational Guidelines at A-11, 15-16, 20-22, 58-62.

The council should be recognized as the lead agency for purposes of NEPA compliance in the initial phases of the fishery management process, because the council has the primary responsibility under the Magnuson-Stevens Act for developing FMPs or amendments, and the NEPA procedures are intended to be integrated with other planning and review procedures. The CEQ regulations and NAO 216-6 provide that, to the extent possible, EAs or EISs are to be combined with other documents such as FMPs. 40 CFR §§ 1500.4(o), 1506.4, NAO 216-6 § 6.02.d. The only way that can occur, and that the NEPA and fishery management procedures can be fully integrated, is through the active involvement of the council in the planning, document preparation and public review phases. Once the NEPA and fishery management documents have gone through public review, and are ready for submittal to the Secretary, then the responsibility for confirming NEPA compliance shifts to NMFS.

Of course, the council and NMFS must cooperate throughout the process in order for it to work effectively. As noted in the NAPA Report, the councils generally have limited staff and budgets in comparison to NMFS, and must rely on NMFS for much of the analysis required for both the NEPA and fishery management processes.

Further clarification of the respective roles of the councils and NMFS in meeting NEPA requirements as part of the ongoing Regulatory Streamlining Project would be useful. NAO §216-6 could be amended, consistent with the Operational Guidelines, to reflect the council's authority under NEPA. One approach would be for the council to have their own Responsible Program Manager (RPM) that would jointly determine with the NMFS RPM how to divide the responsibility for preparation of any NEPA documents. Another approach would be to identify the council as the lead agency or a cooperating agency under the CEQ regulations. The councils have "special expertise" under 40 CFR § 1508.26 based on their statutory authority and program experience in developing FMPs under the Magnuson-Steven Act. On the other hand, NMFS has "jurisdiction by law" under 40 CFR § 1508.15 due to the Secretary's final authority to approve or veto FMPs.

ISSUE 3: The provisions of the Magnuson-Stevens Act outlining the duties and responsibilities of the regional councils do not specifically contain any reference to the conduct of litigation. In 1980, the Justice Department's Office of Legal Counsel concluded in legal opinion that the councils do not have independent authority to initiate litigation in its own name. 4B Op. Off. Legal Counsel 778 (1980), . The precise issue was whether the councils could sue the Secretary of Commerce over a decision overruling the council. The opinion concluded that a council could not "litigate against anyone." However, it was noted that a state or individual members of the council could file suit in their own names, citing Maine v. Kreps, 563 F.2d 1043, 1045 n. 1 (1st Cir.1977). This opinion states the appropriate legal rule as to the litigation authority of the councils.

Similarly, a council is not a proper defendant in litigation challenging a regulation or an action by NMFS pursuant to a fishery management plan. 16 U.S.C. § 1855(f). The proper defendant is the Secretary, NMFS, or NOAA, not the council or its members. The Magnuson-Stevens Act contains no provisions authorizing a council to sue or be sued.

A related question is whether a council, in its own name and its own attorneys, could otherwise participate in a case brought by other parties against the Secretary of Commerce. By statute, the Attorney General of the United States has the authority to "supervise all litigation to which the United States, an agency, or officer is a party" except as otherwise provided by law. 28 U.S.C. §§ 516, 518, 519. The only circumstances in which a federal "entity" can litigate independently of the Attorney General is where such independent authority is clear from the governing statute. In Tennessee Valley Auth. v. United States Envtl. Prot. Agency, 278 F.3d 1184, 1191-1193 (11th Cir. 2002), the appeals court found that the Tennessee Valley Authority had independent litigation authority. In contrast, the regional fishery management councils lack clear authority to pursue their own litigation agenda.

Another related issue is whether a council may participate in any pending litigation, in particular with respect to possible settlement, against the Department of Commerce involving that council's approved fishery management measures. In a settlement, it is possible that existing fishery management regulatory measures could be altered. As just noted, the lawyers of the Justice Department are responsible for supervision of all litigation against NMFS or NOAA involving fishery management issues, including ESA and NEPA claims. The Justice Department also has plenary authority to settle any litigation brought against a Federal agency, presumably after consulting with its client (e.g., NMFS or NOAA). 28 U.S.C. §§ 512, 514, 516, 517, 518, 519; United States v. Hercules, 961 F.2d 796, 798-800 (8th Cir.1992). This authority has been interpreted to allow the Justice Department to settle any litigation, possibly without the concurrence of other agencies. United States v. South Fla. Mgmt. Dist., 847 F.Supp. 1567, 1574-1577 (S.D.Fla. 1992), aff'd in part, rev'd in part, 28 F.3d 1563 (11th Cir. 1994), cert. denied sub nom. Western Palm Beach County Farm Bur. v. United States, 514 U.S. 1107 (1995). One court has determined that the Justice Department is bound by the same laws in any settlement as the defendant agency in arriving at any settlement. Executive Bus. Media v. United States Dep't of Defense, 3 F.3d 759, 762 (4th Cir. 1993). Thus, the Justice Department's authority to conduct litigation, including settlement, is plenary, unless modified by statute. 6 Op. O.L.C. 47, 1982 OFC LEXIS 34 (1982).

We have found no legal reason, however, why representatives of the council could not participate in, or be consulted about, litigation decisions, including settlement. A court is likely to conclude that any such participation by the council or its staff is "intra-governmental" and therefore immune from disclosure.[50] Carl Zeiss Stiftung v. V. E. B. Carl Zeiss, Jena, 40 F.R.D. 318, (D.D.C. 1966), aff'd sub nom. V. E. B. Carl Zeiss, Jena v. Clark, 384 F.2d 979 (D.C.Cir.1967), cert. denied, 389 U.S. 952 (1967). Such participation could include review of any terms of settlement or participation in discussion of compliance orders to be issued by a judge, such as the order prepared in the New England groundfishery case. See Conservation Law Found. v. Evans, No. 00-1134 (D.D.C. 2002) (amended remedial order, May 1, 2002). However, the final decision as to the appropriate action in a particular case, including terms of any settlement or the position taken on any proposed compliance order, rests with the Justice Department, in consultation with NMFS and NOAA.

ISSUE 4: It is clear that the statutory mandates of the Magnuson-Stevens Act, the ESA and NEPA create multiple and conflicting legal responsibilities. Under the Magnuson-Stevens Act, the council is simultaneously charged with achieving commercial fishery harvests at maximum sustainable yield and preventing overfishing. The management of fisheries is subject to the mandate of the ESA requiring preservation of threatened and endangered species. In addition, NEPA add a layer of procedural complexity into the extensive procedural requirements of the Magnuson-Stevens Act. The council is bound by all these statutes, which must be harmonized to the fullest extent possible. Because of this complexity, it is quite difficult to respond to general questions about procedural and substantive conflict between and among the statutes. The issues

[50] The general definitions to Title 28, United States Code, include a broad definition of a federal "agency," which is defined as "any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense." 28 U.S.C. § 451.

must be dealt with on a case-by-case basis, as they arise. Nevertheless, some general guidance is appropriate and can be provided.

The Magnuson-Stevens Act is the foundation for the actions of the council and is the starting point for determining all procedural and substantive duties in a particular situation. The council must always comply with the Magnuson-Stevens Act.

Where the action of the council in managing fisheries is likely to jeopardize the continued existence of any threatened or endangered species, or result in the destruction or adverse modification of critical habitat, the ESA comes into play. In the event of conflict between the mandate of the Magnuson-Stevens Act and the ESA, the ESA prevails. Under Section 7, the council and the NMFS Office of Sustainable Fisheries are to work with the NMFS Office of Protected Species to identify and implement reasonable and prudent alternative fishery management measures that will protect listed species and critical habitat.

The Council must comply with the procedural requirements of NEPA to the "fullest extent possible", which means "unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible." 40 CFR § 1500.6. As discussed below, under NMFS' long-standing administrative interpretation, there is no conflict between the provisions the Magnuson-Stevens Act and NEPA, and the procedures of both statutes can be implemented concurrently. In light of NMFS's interpretation and the court decisions that have applied NEPA to fishery management actions to date, it is doubtful that any of the judicially created NEPA exemptions would be held applicable to the Magnuson-Stevens Act, in the absence of further direction from Congress. Chevron U. S. A. v. Natural Res. Def. Council, 476 U.S. 837 (1984), reh'g denied, 468 U.S. 1227 (1984) (federal court to give substantial deference to agency interpretation of unclear statute).

According to NMFS' interpretation of NEPA and the Magnuson-Stevens Act, there is no "irreconcilable conflict" between the two statutes. NMFS regards the Magnuson-Stevens Act and NEPA procedures as compatible, and capable of being implemented concurrently. NAO 216-6 §§ 5 and 6, Guidelines at A-11. This interpretation assumes that the "federal action" for purposes of NEPA includes the work of the Council in the planning, document preparation and public review phases of the FMP process.[51] The Councils are not bound by statutory deadlines in the planning and document review phases. Instead, the amount of time taken by the councils to prepare FMPs is discretionary, determined by the councils on a case-by-case basis, depending on the fisheries under consideration. Operational Guidelines at A-22. Because there are no statutory deadlines imposed on the Council in the FMP process, there is no "irreconcilable conflict" between the Magnuson-Stevens Act procedures and NEPA procedures. Westlands Water Dist. v. Natural Res. Def. Council, 43 F.3d 457, 460 (9th Cir. 1994), aff'd sub nom. O'Neill v. United States, 50 F.3d 677 (9th Cir. 1995), cert. denied, 516 U.S. 1028 (1995).

The result might be different if the Secretary's review and approval were viewed as the "federal action" for NEPA purposes. Once an FMP is formally transmitted to the Secretary, there is a 60-day public comment period, followed by a 30-day deadline for Secretarial approval

[51] In contrast, NMFS has a narrower interpretation of "federal action" for ESA purposes, which focuses solely on the Secretary's review and approval.

or disapproval. It could be argued that it is impossible to prepare an EIS within the time allowed for Secretarial review, and that NEPA must give way. Of course, that is not how NMFS or the courts have interpreted the relationship between the Magnuson-Stevens Act and NEPA to date. It is unclear why NMFS construes the "federal action" broadly for NEPA purposes to include the council process, while at the same time construing "federal action" narrowly for ESA purposes, to exclude the council process. However, given the established agency practice, at this point the courts would probably take a dim view of any attempt by NMFS to reinterpret the relationship between the Magnuson-Stevens Act and NEPA.

Although a reasonable argument can be made that the procedures of the Magnuson-Stevens Act are the "functional equivalence" of NEPA, it is unlikely that the courts would agree, for similar reasons. Although they are not a mirror image of NEPA, the standards established by the Magnuson-Stevens Act provide for thorough consideration of environmental issues, both pro and con. For example, FMPs are required to include measures necessary to prevent overfishing, rebuild overfished stocks, and to protect the long-term health and stability of the fishery. FMPs must assess and specify the present and probable maximum sustainable and optimum yield from the fishery, and describe and identify essential fish habitat. FMPs must include a fishery impact statement, describing the likely effects of conservation and management measures on participants and fishing communities. FMPs must specify criteria for measuring when the fishery is overfished, and measures to prevent or end overfishing, and rebuild the fishery. 16 U.S.C. §§ 1853 (a)(1), (3), (4), (7), (9) and (10). The council process provides extensive opportunity for public notice and comment, and is subject to judicial review. The council process could be construed as striking a reasonable balance between some of the advantages and disadvantages of the full application of NEPA. The problem with this position, however, is that NMFS has never asserted that the council process is the "functional equivalence" of NEPA procedures. In addition, to date the courts have treated "functional equivalence" as a narrow exemption, applicable only to the EPA. Without further direction from Congress, it is unlikely that the theory would be held applicable to the fisheries management process under the Magnuson-Stevens Act.

It is also unlikely that, without further Congressional action, the courts would conclude that Congress intended to displace NEPA in enacting the Magnuson Stevens Act. The Magnuson-Stevens Act was enacted after NEPA, and is a more specific statute governing the environmental impacts of fisheries. However, NMFS has consistently applied NEPA to fishery management actions. The Magnuson-Stevens Act has been amended several times. Although Congress could have legislatively overridden NMFS' interpretation concerning the application of NEPA, it did not do so. Congress's inaction could be construed as evidence that Congress does intend for NEPA to apply to actions under the Magnuson-Stevens Act.

It is also doubtful that NEPA would be held inapplicable to fisheries management actions under the extraterritoriality theory currently being asserted in Natural Res. Def. Council v. United States Dep't of the Navy, No. CV-01-07781 (C.D.Cal.) (Navy). The government's argument in that case is based on the lack of a clear statement by Congress that NEPA applies in the EEZ. However, Congress has clearly stated that the Magnuson-Stevens Act applies in the EEZ: "the United States claims, and will exercise in the manner provided for in this Act, sovereign rights and exclusive fishery management authority over all fish, and all Continental

Shelf fishery resources, within the exclusive economic zone and special areas." 16 U.S. C. § 1811(a)(1). See also 16 U.S. C. § 1801(b)(1). At the same time, Congress has clearly stated that actions under the Magnuson-Stevens Act must be consistent with "other applicable law", which has been interpreted by NMFS and judicial decisions to include NEPA. These provisions, read together, suggest Congress did intend for NEPA to apply to fishery management actions in the EEZ. In addition, the NMFS policy on the scope of NEPA analysis is to consider the impacts of actions on the marine environment both within and beyond the U.S. EEZ. See NAO 216-6, §§ 1.02.b.1, 3.02 and 7.01.

There are also a number of distinctions between the anti-submarine warfare technology program at issue in Navy and fisheries management under the Magnuson-Stevens Act. The government is arguing that NEPA does not apply to submarine sea tests with impacts exclusively outside U.S. territorial waters or in the U.S. EEZ. Fishery management actions in the EEZ often have impacts in adjacent state waters, for example through the harvest of migratory fish stocks. In certain circumstances the Secretary may even pre-empt state regulation, and actively manage fisheries in state waters. Additionally, fisheries management actions generally do not have the national security or foreign policy implications that are presented in the Navy case, and other cases where courts have declined to apply NEPA abroad. See, e.g., NEPA Coalition of Japan v. Aspin, 837 F. Supp. 466 (D.D.C 1993).

In summary, despite the fact that the procedures of the Magnuson-Stevens Act are similar, the Council must comply with both statutes. In theory, there are no conflicts. The fisheries management and NEPA procedures are compatible and can be implemented concurrently.

We recognize, however, that the relationship between the Magnuson-Stevens Act and NEPA procedures may represent a situation in which the legal theories and practical realities are different. It is one thing to say that the fishery management and NEPA procedures can be implemented concurrently, and quite another thing to do it in a timely manner. Concurrent implementation may work reasonably well when the required environmental document is an EA, but the situation changes dramatically when an EIS is required. As the NAPA Report recognizes:

> It is a complex task to analyze proposed actions required under the MSA, NEPA, and other statutes, and to identify their impacts in conjunction with multiple alternatives. It is the rule, rather than the exception that considering one action has a cascading effect that changes the impact of other actions contained in FMPs. Hundreds of potential impacts may be possible given the different combinations of quotas, size limits, seasons, closed areas, gear requirements, allocations, rebuilding schedules, and other management measures. Because fishery participants, industries, and communities are so geographically diverse, the impacts are not uniform across the entire spectrum of groups affected. Specifically, selecting and assessing a reasonable range of alternatives can be extremely difficult and subjective under NEPA. Even though voluminous tables of data and scientific reports often

> are appended to analytical documents, the sheer volume and quality and constrain the analysis being performed on the possible combinations of alternatives and impacts.

NAPA Report at 49.

The practical difficulties of applying NEPA to the fishery management process are illustrated by the fact that it has taken over five years to prepare a DPEIS for the West Coast salmon fisheries following the Ramsey decision, 96 F.3d 434. Similarly, it been more than three years since Greenpeace I, and the alternatives PSEIS for the Alaska groundfish fisheries are still being analyzed. In the meantime the fisheries take place every season.

In light of the fact that the procedures of the Magnuson-Stevens Act and NEPA are similar, it may be appropriate for NMFS to reevaluate its policies on the application of NEPA, or for Congress to clarify the relative priority of the statutes.

A further issue remains concerning the application of NEPA to actions under the ESA. In Ramsey case, the Ninth Circuit held that the issuance of an incidental take statement under ESA Section 7 was a major federal action for purposes of NEPA, and that NMFS was required to required to comply with NEPA before issuing the statement. Ramsey, 96 F.3d at 443-444. This aspect of the Ramsey decision has not been widely discussed by other courts. In practice, NMFS has tried to limit the ruling that NEPA review is required before an ITS to the case of the Columbia River fisheries. There is, however, no logical reason for limiting the scope of the decision in that manner.

The Ramsey decision has the potential to create a serious conflict between the procedures of Section 7 of the ESA and NEPA. NMFS and the FWS conduct numerous consultations every year. According to one NMFS website, over 25 Section 7 consultations were conducted by the NMFS Northwest Region Office in 2002 alone. If NMFS were required to prepare an EIS before issuing each of these biological opinions, the already complex process would become even more burdensome.

A formal consultation under ESA Section 7 must be completed within 90 days, unless extended by agreement of the action and consulting agencies. Under the circumstances, NMFS should consider whether there is an "irreconcilable conflict" that makes it impossible to comply with NEPA procedures before issuing an ITS under ESA Section 7. Alternatively, NMFS should consider whether the ESA Section 7 procedures displace NEPA, under the reasoning of Douglas County. As noted above, the courts have held that NEPA does not apply to listing decisions under ESA Section 4. Pacific Legal Found. v. Andrus, 657 F.2d 829 (9th Cir. 1981). Although there is a split between appellate circuits, the Ninth Circuit has ruled that NEPA does not apply to designation of critical habitat. Douglas County v. Babbitt, 48 F.3d 1495 (9th Cir. 1995). Although the law is unsettled, an argument exists that Section 7 consultations do not require NEPA compliance.